L. Church^{s}

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Detinue

This action lies for recovery of a specific personal chattel - in nature of a relief in Eq. - judgt. is for restoration of the thing detained conditionally - viz - that if it cannot be had Deft. pay the value & damages of detention. 1 Inst. 28 b 3 Bl 152 Cro J 361 2 Bac 45 - Selw 697 L 174

It lies to recover any personal chattel which may be identified - not for money counts unless it be identified - as being in a bag &c 1 Roll 606 Com Detinue - 3 2 Bac (4.5.). 1 Inst 28 b -

It lies for a piece of gold of such a value - viz - 20/- in money - Comb. 456 B - but not for 20 shillings in money Cro E 457. 1 Inst 28 b

It lies in those cases only in which Deft. obtained possn. lawfully, as by delivery or finding &c - 2 Bac 45 - 1 Roll 607. 2 Lev 20 Willes 118

The action seems founded on contract & debt & detinue may be joined in one declarn. - the genl. nature of the action is the same as debt. 3 Reeve H. E. L 67. 4 Bac Ab. Tit. 2. 3 Bl 154 - 2 Lev. 60 Bantier

But it does not lie for money lent - for it is not to be specifically restored. 2 Bac 47. 6 Roll 606 Recall

Trover lies in all cases in which detinue lies - but not a converse - for trover lies where the taking was tortious - &c -) Cro E 824)
The reason appears to be this - a tortious taking seems originally to have been considered as divesting the owner of his property & in detinue Pff must have the property of the thing demanded Com Deft. C. viz. Davison. S. contra in same case)

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Detinue

- better reason — founded on contract express or implied - contra 2 Sec 20 -

This action is annual by reason of the wager of law & certainty required in describing the thing demanded — Trover has taken its place under the eq. of the St Westm 2 2 Ba 45. 10 Co 57 Mar 481. Cro J 244 2 Salk. 18 -

If the circumstances under which a fraud was committed were suff. to fix a party with constructive notice & he does not use the precautions to employ an Atty. which common prudence requires he is in the same situation with respect to such notice as he would have been had he employd an atty. But a mortgagee is not charged with constructive notice of a fraud done by his Atty. before taking if the fraud is such as the Atty. ought to conceal. 10 G. & Joh 370 Nid Daniel v Davison 16 Va 249 Pierce v Mill 13 Va 114

If a Ptf. or contract require one to give notice in writing to another without mere as a condition precedent to his validly doing an act he must show that such notice has been given or that the other wilfully refused to receive it when offered. Cases where required to be given at a certain time & place for then a mode of service is pointed out & must be pursued 8 Co. E. Ch 404 — 1 Ch. Pl 320. 2 Bulst. 44 2 Saund 62 a 5 T.R 621 11 Mod. 48 1 Ch. Pl 320

Rule When a matter does not lie more peculiarly in the knowledge of one party, than of the other notice is not requisite 2 Saund 62 a 4. Co. 4 to act on a thing on performance of an act by a stranger. 1 Bulst. 44 1 Roll 462 Freem. 254 / But if by the express terms of a contract notice is to be given, no liability until actual notice / 2 Bulst 114 / In Provinces by the submission that notice of the ann. should be given to the frontier it is no ann. till notice be given. 2 Saund 62 a — 1 Ch. Pl 321

Said 18 Ward 427, that when suit is left agt. sureties involving the title of the thing sold a fair notice of the suit to sureties will bind them to all the consequences of a judgt in the suit & that it is his duty to make defence — 1 Johns 517 18 Ward 125 & Cowen 184

1 Ch. Pl. 320.

Notice and Request

Ct. C.L. a request by Pff. in all actions on contracts, is necessary - tho in many cases it may be by writ only. Cro E. 98 12 Mod 92 Chit. 133 10 Mod 38 3 Sal 308 Com. Pl. E. 6. 70 -

Pff must always aver (denied Sand. Pinky 188) notice to Deft. where it is expressly made necessary by the terms of the contract - Ex where the fact or event on which the demand arises is (as between the parties) confined to Pff's knowledge - Ex a promise to pay Ex. at such rate as any other person should pay Pff. for the same - (Hob 51) Sems if to pay as much as S.S. shall pay - Com. Cond. E. 8 Hand. 42 Cro J. 432 1 Roll 463 -, So a promise to pay on the day of promisee's full age - Sems if to pay on the day promisee marries or certain person Com. Notice A - Cond. E. 8 Read. E. 75 Leach 158 Cro J. 57.

So on a promise to deliver a quantity of corn if Pff approved it - Pff must aver that he gave notice to Deft. that he approved it - So on a promise to account before auditor when obligee shall assign - Pff must aver notice &c - 5 Com 53 Cro E. 249 3 B.R. 633 1 Roll 462 650. Sems on a promise to pay on performance of a certain act by promisee - Ex when he delivers a certain horse to B. 5 Com 53. Cro J. 102 228 405 - qre of the first example Hob 68 1 Bulst 44 contra Pl. 245

So it must appear to have been given in good time - But if Deft. contracts to pay on performance of an act by a stranger Pff need not aver notice Deft. must take notice at his peril - 1 Roll 469 Com. Pl. E. 4 Cond. E. 9. 2 Bulst 144 Hob 14 2 Wms 315 -

Notice and Request

So when B returns into the realm - or to pay if B does not pay &c - no notice is necessary - Cro J 492 884 Cro E 133 2 Bulst 144 8 Co 92 4 Mod 230 Com Pl. C 35 - Con. 29.

So in some cases (Semb) Deft. is bound to give notice - As on a promise by Deft. to pay such a sum when he shall receive it &c Bulst 112 -

In some cases Pltff must make some a special request - as if Deft. engage to pay a certain sum on request no day being fixed &c Com. Con. 210 Pl. C. 69 Latch. 231 Cro E 85 91. - & the request here is a part of the consideration & traversable

Actual request is not necessary where the debt or duty is precedent to or independent of the contract &c on which &c - tho the promise be to do on request - for here the request is not of the ground of action - As, a promise to pay on request the price of a horse hired or bought - If the duty would exist without the promise the request is not of the gist - hence "often requested" &c, is suff. - Semb of a promise to pay the debt of another on request - 3 Sel 308 Cro E 74 3 Leon. 200 Latch 93 209. B

But this rule does not hold of a collateral promise - or a promise to do a collateral act - as a promise to deliver a loan of wheat on request - the request must be special (Sel. 308 Com Pl. C 69) & the rule must be understood of those cases in which the express contract does not say the duty already existing - for the subsq. contract may be to do a collateral act on request - For in the last case the right of action is founded on the promise & request (these

If a stranger to a suit agree to pay the taxable costs he is entitled to notice of their amount before suit brot. 2 Mass 158 So if one agree to indemnify another against all damages he may destroy in doing an act 1 Mass 50. 1 Johns 515 6 do 155 7 do 171 7 Cranch 308 1 Stark. E. Ev 41 - 5 Hill 39 1 Saund 32 n 2 2 do 108 n 3 1 Ch Pl 363

If one is confined in jail on an exd. in favor of several creditors living within the state notice must be given to all to have the oath administered if ded. without such notice it is an escape 11 Pick 489 -

Request.

B. The distinction between a promise by a pt. to pay a debt of his own & that of a third person is overruled 1 Ch Pl 323 1 Stra 88 1 Burr 03 Cow & 548 Bro f 183 523 Oro. 119 Com. Dig E 85 -

1 Root 191. 210

To charge the indorser of a note made by two or more not partners demand must be made on all the makers 5 Hill 232 1 Ct R 367 — 5 J.R. 409 / 1 East 204 / 1 Ch. 324

When two or more are joint & joint & several bound to do an act on notice notice to one is sufficient altho he is not the party sued 1 Saund 58 — 1 Ch Pl. 324

Power to distrain for rent if in arrear 20 days after demand & if in arrear 40 days to enter & enjoy as Rent in arrear 40 days party may bring ejectment without demand 2 B & C 201

See qu. at b.L. 1 Stra. 89 214 1 Wils 33 7 J.R. 522 1 Saund 228 n 1 Ch Pl 324 Fray 185

No demand need be made on a Bond for money seem if it be a bond with a penalty to secure the performance of a collateral act 27 E & 235

xred 3 Day 327

Where the party on whom a demand should be made becomes insane & the liability continues a demand on him is a nullity it ought to be made on his committee 29 E.L. 142.

Notice and Request

being no antecedent duty) special request must be alleged - Covt. that lessee shall repair & leave fence tender - lessee must demand the tender. Com. Cond. L10 Pl. 69 3 Sal. 308 Cro. J 183 -

Where a special request is necessary time & place must be alleged not being traversable. (Cro J 183 Cro E 85. Latch 231 -) qu. Does this rule apply to cases in which the gen. issue involves a denial of request? - the allegation is not then traversable - Ex. Sud. Aft. on a bill of exchange against indorser of which Deft. has had notice - Whenever notice is necessary to avoid an indorser the averment that "Deft was guilty in delay" qui terminis includes notice 12 Co 67

Want of an averment of a special request when necessary is not aided by verdict. 5 Com 52 3 Burst. 299 Cro J 183. Cro E 74. 85 (Doug 183 cont)

Where the special request is necessary the averment is traversable - Semble when not necessary (Palm 389 3 Sal 308 Cro E 74) qu traversable when the gen. issue includes a denial of it -

Gen. rule - When there is a contract to do a thing on demand a Deft. cannot discharge himself by tender without request or special request is necessary - Ex. Merch. engages to deliver such a sum in goods at his store - So (Semble) if he engages to deliver such a sum in goods at a time fixed - for he cannot select the goods. 3 Sal 308 x Secus if to be selected by a stranger - he should then request the stranger to select the goods 3 Sal 308 Allen 25

But when he can discharge himself by a tender no special

Notice and Request

demand is necessary in gent. qu. 5 Co 30 1 Brit 208 6 Co 8 / 98

The two last rules so far as they interfere with the particular ones before laid down are subordinate

If one accepts a bill of Exchange to be paid by his banker at the store of the better presentment of the bill at the place of payment is primâ facie necessary to give the holder an action against the acceptor or indorser — Semble if he can be proved to have had no effects in the banker's hands — Cro B 134 Stra 1195 Bayl. 78 2 H. Bl 509 n.

A mere assistance of rent sufficient to notice given to quit is no waiver of the notice Comp. 243

If the award of Arbitrators be to pay on request an Ind 252

2 H. Bl. 78 that every possible condition upon which money is to become payable must be performed or dispensed with upon such ground before the money is demandable in an action — If a stranger is to do the first act the obligee is to procure the stranger to do it — But if the obligee is to do the act he can have no demand until he has done it 7 Co 10 1 Saund 319 n 320 2 108 a n 1 Ld Raym 665 4 Bac Ab —

No regard need be made of a mere collecting agent 5 Will 395 as to attys 7 Mend 320 15 do 302 8 Cow. 253 – Sheriffs 3 Camp 347. & Bamf & A. 696 not necessary –

Where notice is given to produce a paper on the trial of a cause the notice is not effect altho many terms intervene between the time of notice given & actual trial – Sans if given to produce at a particular term 6 Johns 20 – if the trial is not had until some other term –

Where one party has put it out of his power to perform his contract the other is exempt from making demand 8 Co 21 1 Brown 76 –

To fix a party with gen.l notice it was proved that for 3 years he had taken a paper in which the notice had been published once a week the receipt being found in favor of such party, a new trial was refused for it should not be intended that one reads all the contents of a paper & where one by notice would divest himself of responsibility it must bring it home to the one to be affected by it 11 Co 1.

Property cannot be taken on a supposition made that it shall be obligatory without notice to the owner 15 Wend 374 15 Johns 537 –

Tho. the law of the road is not to be authoritatively of by departing from it an injury can be avoided yet where the parties meet on a sudden & an injury results the party on the wrong side should be held accountable if it clearly appears that the party on the right had ample means & opportunity to prevent it 14 Ld 445

No action agt. a sheriff for an unauthorized taking of goods but may show in mitigation of damages that the goods were subsequently taken from him & sold bonafide on other process agt. plaintiff 2 Hill 304 Same where the application was on process in favour of defdt 8 Vermt 30 21 Wend 394 17 do 91 24 do 399

Trespass to things Personal

Trespass in its most extensive acceptation at C.L is any transgression of law short of treason - felony & misprision of treason or felony - when not considered as a word of technical import it is any violation of law. 3 Bl 208 5 Ba 15 Ev 775

The word as now used denotes in its gen. sense any misfeasance committed to the injury of another ~~property~~ personal property. Esp 380 5 Com 574

The word in its most appropriate sense imports only injuries by force to the real or personal property of another & as now to be considered comprises all possible injuries to the personal property of another Esp 380

The rights of personal property in poss. are liable to two species of injuries - Abuse or damage while the owner poss. continues & Caption or deprivation of poss. 3 Bl 145 -

Abuse &c - of personal property without attaining the poss. & Poisoning ones cattle &c or doing any damage which takes away from the value of the chattel falls under this description of injury. 3 Bl 153 -

Remedy in these cases if the act is accompanied with force & is immediately injurious is by trespass vi et armis (3 Bl 53 5 Com 582 2 Roll 556 Esp 598) If force is not when Trespass is the proper remedy - judgt is reversed & vice versa. 6 Mr 125 2 Atk 131 Cro E 141 pl -

Trespass to things Personal

Amotion or deprivation &c - This species of injury so far as remediable by tr. vi et. ar. consists chiefly in an unlawful taking - unlawful detainer being generally remedied by detinue or trover 3 Bl 152

Trespass vi et armis gives damages not restitution in specie (3 Bl 151) It lies not for taking a Ship &c as prize the the property has been adjudged no prize - for the question depends upon the Law of Nations & tried in Admiralty Courts only (Doug 5) 2.98.

In some cases where the original taking was lawful trespass lies for subsequent injuries (Esp 381.) Ex If a beast is taken as a stray & afterwards abused - Qeft trespass or at initio - Co 8 114) 4 T R 12 8 Co 146 5 Com. 580 3 Wils. 20 -

Rule - When the authority to do the original act is given by law an abuse of the authority makes one a trespasser ab initio (Esp 383. 404 5 Com 581.2 Bull 81 Bl R 1281 - 5 Ba 161. 8 Co 146 2 Roll 561 Yelv. Qb.) 1 Ba 36. 3 Wils 20 1 Show 12 1 Str. 12 Sal. 221 Burn 20) As if a person enters a tavern & steals - he is a trespasser by relation in entering 8 Co 146

So if a Sheriff does not make return of a writ when he ought to - Esp Mesne process (5 Com 582 2 Roll 563 5 Ba 165) But the subsequent abuse of the right thus given must be a positive misfeasance - not a nonfeasance - Ex Case of a tavern keeper where Deft stole he would not have been a trespasser ab initio for refusing to pay his bill - Esp 383 5 Ba 161 8 Co 146 2 Burst 312 -

Legal

Deft is liable altho the injury happened thro inevitable accident & without any intention on his part 2 Mand 392 Hob. 134 3 East 593

Said in 1 Bing. 213. that if the accident happen entirely without fault of deft & no blame is imputable to him an action will lie 8 Mand 472 cites Hob. 134 3 East 593 1 Bing. 213 19 John 289 3 Mand 391 14 John 343

Infants are liable in the same manner as adults Bingen Def 110 & 8 Ph 335 16 John 389 But where infants are actors that might probably be considered as unavoidable accident adults would not be so considered nor adults the actors 3 Mand 393.4 Ba. Infancy Ph. Pers D. Infancy A.

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said by the Court in 11 Co. L. 72 that if it had power to alter the law it would hold that if the owner of property consented himself wherein would prove a good title from the form that the consented owner permitted to hold it should retain the property against the owner –

2. The gen. owner of person. property having a right to immediate poss.n may in gen. maintain an action for an injury to it – 1 Co. 48. 2 Saund. 47 and 7 & R. 12 1 Bulst. 68 bq. Lease in fee of Real property – actual poss.n necessary 1 Co. 49 Com. Dig. 3/3. 1 Co. 195. 150. 10 Co. 225 11 Pick 354 17 Ill. 110

Bare poss.n of a Stranger is suff. to maintain the poss. agt. a wrong doer 13 John. 141 2 Saund 47 d –

1 Co. 48
2 Saund 47 and –

Trespass to Things Personal

So if one having taken a distress lawfully refuse to deliver it on tender of suff.n amends (5 Com 581 2 Roll. R 130 — here the remedy is case — Exception to the rule in the case respect of the Sheriff who omits to return the writ &c 5 Ba 162 Sel 409 Ld R 532 vid S. 214

Where the party gives the licence under which the original act is done the other can never be made a trespasser by relation — (Perk. § 191 2 Leon 64 2 Roll 561 8 Co 146 Yelv. 96.) for tho the law will fain punish in case of abuse of the act authorised by itself yet it will not allow the party to treat as unlawful what he himself made originally lawful (5 Ba 162.) Ex — Unlawful detainer or abuse by a bailee f. 5 Com. 581. contra vide 5 Ba 162. Rule in Com 581. denied — — But if bailee destroys the thing trespass lies — for he extinguishes the bailment — but he is not a trespasser ab initio Semb. Litt § 7. 1 Sud 57 5 Co 13. Mod 248 5 Ba 264 S. 319

a. To maintain this action Pff must have prop.y — property alone is not suff.t (Esp 383 4 B R 487.) Ex Pff let a house & furniture to J.S. — Def.t pending the lease levies on ex.n on the furniture as belonging to J.S. Pff bot trespass — held not to lie — Pff not prop.y — it should have been trover 1 B R 486 — from holden that trover will not lie 7 B R 9 S. 319 — qu does property mean poss.n S. 199. 274

Constructive poss.n is against a stranger suff.t (2 Roll 564 1 B R 480 4 T R 489 7 T R 9) so generally any person having the gen.l property may against a stranger maintain the action — for it draws to itself a poss.n in law. 5 B 164 5 Com 578 Latch 214 2 Bulst 268

Trespass to things Personal

1 Sid 438 2 Roll 569) Ex. The owner of cattle may maintain trespass against a stranger for taking them &c 5 Com 577. 2 Roll 551

Stagent. property contemplatedly this rule must suppose a right either absolute or conditional of present possn. (qu. as in case of a bailee to keep &c) Aliter it is contrary to 4 BR. 489. 1 Sn. 480 Esp 383) Suppose the case of a bailee for hire for a certain time. L. 319)

So he who has a special property in goods may bring trespass (5 Ba 164. 2 Ins 89 92 (Inst 89 4 Co 84 2 Roll 569) Same generally as in trover - bailor & bailee may both maintain the action (2 Saund 47.) But if bailee deliver the goods to a stranger bailor cannot maintain trespass - tho in some cases he may trover 5 Ba 164. 75 Semble if bailee has only the bare custody as a servant 5 Ba 176. L 320. 21

If property is given to one he may maintain trespass before he has taken possn (5 Ba 162 Latch 214) - property draws possn in law - qu L 198

If goods of a testator are taken away before the will is proved Exr. &c may maintain trespass after proving the will (5 Ba 164 3 Bulst 268 1 BR 480) for he has by relation a constructive possn from testator's death - his right is from the will not from the probate - So a legatee may maintain trespass for taking of Exrs. agent the before delivery to him by Exr. 5 Ba 164 Aliter if the legacy had been of a third part of testator's - not specific - & in the first instance Mr. R. supposes that trespass would not lie if the taking were before the Exrs. agent to the legacy. 1 BR 480

In issuing a warrant for the collection of taxes the officer issuing it acts ministerially & if a Statute provides the form & legal effect of the warrant the authority issuing it is a ministerial officer if he departs from it 16 Mass 109 & if property is sold under such warrant & lost off by the Off or his agent the rule of damages is the amount for which it sold 16 Mass 109 9 Ala 36.

A Sheriff may have trespass or trover against any one who takes away goods which he has seized in exn. 2 Saund 47 1 Sid 282 1 Sid 138 1 Keb 52 1 Mod 30 Cro 291 2 Rol 388 — for he is accountable to Pff for the value of the goods taken if not in exn is discharged — Dam. to the amount taken 2 Saund 47 Cro 1 2 Roll R 57 1 Mod 292 299 1 Sel 323 Lev 235 4 Saun 150 Str 1072 2 Str 594 2 Wils 23 Bull 33. Sp 958

If in the regular course meeting on the highway to turn to the right of the centre of the road they must keep to the right of the centre of the worked part of the road it is not the centre of the smooth or most travelled part of the road which is the dividing line but the centre of the worked part tho the whole of the smooth or most travelled part may be on one side of that centre and it is no defence that the party had no design to offend that he attempted to prevent collision that the road on his side was easier & more difficult for him to turn out than the other party unless the obstacle were insuperable or extremely difficult 7 Burrell 185

Trespass to things Personal

In trespass for goods taken & belonging to two both should join - but the defect is pleadable in abatement only. 1 Com 12 Sal 32. 4 3 Lev 254. 1 Rol 31 Esp. 586 411 Litt. 323 Stra 820.

It seems that at C.L. trespass does not lie for an act amounting to a felony - as robbery &c - by reason of merger - 5 Com 582. 5 B.R. 1 5 Bar 1676 1 Lev 21. 4). 1 Com 130 Yelv. 90 1 Sid. 375 2 Rol 1557 1 Mod 283 1 Son 148 Leach 144 Noy 82 Eng. authorities contradictory as to the application of this principle - no such principle here - merger founded on forfeiture Lewl. qu. Stra 878 Ld R 1572 3 B.R. 176 sug. cont - Bull 131 - I cant understand -

If a Sheriff &c takes the goods of one on ex. against another he is liable in this action Cang 40 I. 66.

In declaring the goods must be described with convenient certainty Esp 404 - "divers goods" or "Pltffs goods" not suff. - nor need by reason - for one recovery would be no bar to another & Coff. could not justify Ld R 1410 11 Burr 4455 Stra 837. 5 Co 35 - L 340

But this rule applies only when the action is founded on the taking of or injury to the goods themselves - not when the injury is laid by way of aggravation - then "Pltffs goods" generally is suff. - Eg. trespass for breaking & entering Pltffs house & spoiling his goods is suff. Esp 406 3 Wils. 292 given on special demurrer. Trespass for breaking & entering Pltffs house & expelling Pltff - expelling is only aggravation unless Pltff make a new assignment of it as a substantive trespass - 1 Bos. 230 1 B.R. 555 - 3 B.R. 292 1 Vent 211

If property is distrained to satisfy a tax ~~[illegible]~~ levied on property over which the assessors have no jurisdiction trespass lies 24 L.L. 107. Semble if the objection to the rate may be taken by appeal 6 T.R. 580 Feb. 1792 & where a body is authorised to lay a tax a right of appeal is given the only remedy is by appeal for an excessive or unfair assessment. but if the assessment is made on property over which such body has no jurisdiction the proceeding is void. 38 L.L. 88

L. 375

A. Semble in an action of assumpsit if deft. plead non assumpsit & assert new assign. 4 Esp. C. 38 and see 2 D.L. 1015 2 Saund 5 Am 3 P. 299 a - n b

Trespass to Things Personal

2 Wils. 313 Str 20 4 Bac 12 –

So a general description is suff.t if it is made particular by a reference to other things in the declar.n (Esp 406 – – Ep "General keys for opening the doors of the house aforesaid" – Sel 643 1 Vent 114

Trespasses of a permanent nature may be laid with a continuando – Esp 316 407. Sel 638 Str 239 – otherwise a demurrer is due Lev 3 Wil 212 Salk 1223 1 Lev 250. 3 Sel 3. Sel 639. – But laying with a continuando when the acts lie not in continuance – not cured by verdict unless some of them lie in continuance – Esp 408 Sel 639 – Str 239

Pl. must state poss.n or property showing a right of poss.n – i.e. either an actual or constructive poss.n – Esp 406. 333 Sel 640) "from Pl.'s ten.t" not suff.t Cro J 45 4 Bac 400 Str 480 "taking hay from Pl. land" not suff.t – Declar.n in these cases not good even after verdict – Value must be stated Esp 407 5 Bac 190 1 Sid 30 2 Lev 230 4 Co 3 129 5 Com 349 2 Vent 44 (Esp 555 that case need not be alleged in Trover) – omitting an account of value is cured by verdict – Esp 407 5 Bac 190 Sid 39.

Pendency of another action for the same trespass is a good plea in abatement – 5 Co 61 1 Com 49 110 1 Bac 13 (Cartwright) Semble if the other action for the same trespass is against a stranger – 1 Com 50 1 Ld 138 4 Bac 480 Stra 420 5 Bac 192.

Any Land not material – Pl. may have trespass at any time (not within St. Lim.n) Esp 407 219 21 415 Salk 19 Str 231 1 Saut 280

Trespass to things Personal

Cro E 32 (Act 114) being if a release is pleaded Pltff must traverse or to the subsequent time &c Esp 415 vid 5 Ba 1067. Bullet 38 - Lev 90

Pltff by way of aggravating damages may allege in his declarn things for which he could not have an action - Esp 409. 3 N B 196 Sed 119 Stra 61 1 Bul 787 - qu. Is it to aggravate damages? Esp 317. Sed 6 Mod 2 Ld R 1032 -

If trespass is committed by several Pltff may declare against one or more or all - or against each separately 5 Ba 192 Stra 1120 L 344

If on judgt against several one is obliged to pay the whole he cannot oblige the other to contribute = rule common to all torts. Mend 164 8 8 R 186 Bridg 116) But if it appear from the declarn that Deft with another person certain committed the trespass the declarn is ill for not joining that other 5 Ba 192 1 Leon 111 1 Mod 199 1 Leon 41 qu as to the principle - torts being several Deft pleading or shewing the fact does not hurt the declarn Stra 1120 1 Mod 199 Aliter if the other is not known L 790.

Justificatn must be pleaded (Esp 411 1 Bul 282 Stra 61) If justification pleaded by one of several claim upon the whole that Pltff had no cause of action judgt cannot go against either even if one be defaulted or found guilty - Eg. Licence pleaded &c Esp 428 1 Stra 610 1 Mod 54 Ld R 1372

Words vi et armis not necessary in Ct (Kermath v Phelps in the case cited there was a special demurrer - See Ling

If in trespass qu. cl. fr. a taking of goods from the place is also alleged in aggravation of the pltff fault in forcing a trespass in the house he cannot recover for the trespass to the goods 1 Str 475. 3 Stark. 1143. So if Deft. justifies the entry on the close pltff cannot recover for the goods they he might have done if alleged as a substantive cause of action 2 Str 1161. 3 do 292 5 B. & A. 320. 15 Wp 473 Sampson v Roy 3 Stark 1452.

If Deft. justifies under a writ he must set it forth specifically in his plea 1 Saund 283 3 Mod 137 S.C. 1 Salk 104 4 Mod 378 & 2 ought also to aver that he has pursued such authority substantially 1 Saund 303 b

A party whose property has been tortiously taken is entitled to its enhanced value until it has been so changed as to alter its title 8 Wend 50 & 5 John 348 & 7 do 16 & 10 do 237 & Cowen 95

In trespass against an officer for taking property in pursuance of a warrant to satisfy a school tax the defendant cannot show that the school district was not legally constituted - on the ground that persons said in its place is suff. 9 Wend 35-17 5 do 170 231 - But if there whose duty it is to lay the tax exceed their power they are liable 9 Wend 40 -

Trespass to Things Personal

vi et armis are words of substance - for at CL the judgt in case of ~~forcible~~ injuries was a capiatur pro fine - in actions off praid a sum of money on taking out the original & the judgt was a misericordia 11 Ba 11 Jac commencement 8 Co 39 origion all as the judgt Cro J 408 5 Ba 191 S.N.B 109 b Sel 636 Cr. C 407 Cr J 443 52 b - 36. L. 34 b

Now the judgt of capias pro fine is taken away by 5 Eliz c 9 - but off praid a substitute one signing judgt - in actions for injuries with force 6/8 therefore the rule continues 5 Ba 191 Sel 636 & R 988)

So "contra pacem" are in long words of substance (5 Ba 192 Cro J 408 S.N.B 93 Cartt 66 Sel 636 Cr J 426 - 113) These defects are cured by verdict & shall be amended Cro J 408 Sel 640 - by 16 & 17 Car 2 - L 346 . 350

Decided in Ct nearly 30 years ago that trespass & trespass on the case might be joined in one declaration - no later decision - but CL. rule joinder would be ill - per diff. judgts would be necessary & Co 39 - Now the capias pro fine being taken away yet the genl. ordersin has still been the difference on demurrer of the judgts 2 Wils 319 - Case for misfeasance & negligence may be joined in one declaration with trover 2 Wils 319 Semble of trespass vi et armis & trover Semble. 2 Wils 322 1 B R 294

Per in Ct. the rule as to cost may be diff. as to the two causes of action - 2 Sec 2 68. 9

The identity or difference of the judgts not an immaterial

Trespass to Things Personal.

criterion – but when the just & gent. give one the same they may be universally joined – 1 Str 274 2d 349 5 Bac 191. 2d 11 Cro E 20 –

Trespass ie'd a mis lies for killing Pfs horse tho the injury arose from negligence. 18 Ed 6. 26 cited 1 Bac 472

As to the distinction between trespass & case vid. 1 Ven 634 Dyer 1402 8 Mod 272 Cortar 212 Dyer 187 1 Burr 1646 2 Wils 313 3d 403 S.C. 2 Bl. R 892 2 Str 225 2d 649 3d 125 8d 188 3 East 593. This action is transitory. 9 Co. 66 Str 8

If the Bailee of personal property sells & delivers such property to another without notice the Bailor in some case maintains no action against the bailee 2 Saund 476 note 1 –

If a bill of sale absolute of personal property is given nothing paid & no application made upon an existing debt but it is intended as security merely is it fraudulent vid 17 Mod 110 Lanfear v Summer

A. with an exd. agt. B. seized on the goods of C. & they were receipted by D. who was stated on his receipt D. left the goods in the posn. of C. who sold & disposed of them to his own use. Then C. sues A. in trover de bonis asportatis for taking on the goods & A. was holden liable the reason altho A. had never removed the goods & the full value incumbered the receipts was liable to A. to the full amount of his receipt. 5 Maule 613 7 Crown 735 274 - And holden that in such action that any unlawful interference is suffn. tho the Off was not fully dispossessed 1 Cole 151. 2. 3 7 Johns 254 6 Allock 212 4 T R 260 6 East 538. 6 Bar. 677 5 Conns 325 -

Memorie in hands before opened on the land is a personal chattel 2 Roll. Ab. 150 1 Mathew Ab. 27 When a farm is taken for experimental purposes the manure made on it belongs to the farmer 15 Mauld 170 unless the custom of the place or of the particular farm assigns a diffn. interest 2 Esp 131. 4 East 154 Derry 201 Holt NP 197 2 Bos & P 746 1 Marsh 564 -

Said 15 Maud 170 that was in the appropriate remedy for taking & carrying away 1 Cole 142

False Imprisonment

Every unlawful restraint of one's liberty or rather every violation of one's right of loco motion is false imprisonment. 3 Bl 127 Esp 326. Eg Illegal confinement in a private house - Street Co. 2 Smit 587 5 Ba 169 Finch. L 202

Two requisites - 1 Detention of the person - 2. Unlawfulness of the detention. 3 Bl. 127. 2 Smit 587. 5 Ba 169. Finch L. 202 -

The unlawfulness consists in want of authority - Authority may arise from legal process (Esp 333 Sel 408) or from special cause amounting from the nicesity of the case to a justification (3 Bl. 127.) As the arresting a felon by a private person - But it lies not for the seizes of a Ship confiscated as a prize - Law of nations - Doug 572 -

But every arrest of a person for a civil cause without legal process is an unlawful restraint (5 Ba 169. 2 Smit 51.) As custom to imprison without legal process is not good 5 Ba 169. 2 Sow 147

A private person is not guilty of false imprisonment by confining a person arrested by a proper officer at the officers request (5 Ba 169. 2 Roll 55.) Qaeritur that an officer having made an arrest on final process cannot delegate his right of custody in his own absence - (1 Bro 24 L 82.3

The most common cases are those ~~arrests~~ also of arrests under void process - If a Court of record is guilty of corrupt practices (as imprisoning thro malice) the Judge is not liable to an

action if he act judicially & within his jurisdiction. Esp 326 Sal 396 Cowp 172 Esp 335 13 R 503. 13. 34 Bl. R 1141.

In Eng. a Judge of a Court of record of genl jurisdiction it seems is not liable for any judicial act whether it happen thro mistake or malice if he confine himself to his proper jurisdiction (Esp 320 12 Co 23 - Sal 396 1 R 467. Cowp 172 13 R 503. 13. 34. Bl R. 1141 where all the cases are cited) - no proof in this case admitted against this "relinement & violent" presumption in favor of the Judge's integrity, L 1711

But it seems if a Court of record of even genl. jurisdiction has not jurisdiction of the subject matter the Judges are liable - for here they do not act judicially (10 Co 76. 1 Roll 50. 86.) But if they have jurisdiction of the subject but in their proceedings transgress their jurisdiction they are not liable. Semb - qu 10 Co 76 Bl. R 1145 - Sal. 396 - Ex. Quaeriding a capias against one in a civil case

Courts of limited jurisdiction (tho of record Semb) are liable if they transgress their jurisdiction even by mistake (vid. 6 T R 412 Bl. R 1146 1 R 254 - 1 Sal 396 Stra 993 Esp 331 8 Co 114) Aliter if they do not exceed their jurisdiction Bl. R 1145 - Not liable for malicious acts if they do not exceed their jurisdiction being Courts of record - Esp 326 Sal 396 L 1711

Courts not of record (as Courts Baron in Eng) are liable at C. L. for any mistake of judgt. (Stra 910 Cro E 286 394 1 Bl 354 1 R 536 Esp 339.

Whether to constitute such an arrest as will subject the officer to false imprisonmt. if the arrest is unlawful it be necessary that the offr. lay hands on the Off. or that he have it in his power so to do & the Pff. submits & goes with the offr. he suffrs. paid.
14 C. L. 393 Bull. 62. 2 Carr & Pay. 503 N. R.

False Imprisonment

Burn 545.) (qu. unless they transgress their jurisdiction (Bl.R 1115) in some respect) But this rigor is mitigated by recent Ds. Esp 338

But the Court of B.R. will not grant an information against a Justice who appears to have acted uprightly 1 Str 653
In Ct. Justices of peace are Courts of record - 2 Burr 787

Courts which are fined imprison are said to be Courts of record - (Sid R 167. Sal 200 Carth 241 3 Bl. 25 12 Mod 386) Cannot be universally true - Bl.R 1146 -

Commissioners on the estate of an insolvent not a Court of record in Ct - no appeal from their decisions as a Court of record.

Arrests of persons not liable to be arrested

Arresting Ex- or admrs. for testator's debts &c is unlawful except on suggestion of devastavit (Esp 326 Bl.R 1192 3 Wils 368) False imprisonmt lies in this case against the Attys as well as the original Pltff. - Gen. rule that an Attys who is instrumental in causing an illegal arrest is liable with the principal 5 Wils 345. 77. Bl.R 1192.

In this case Sent. the officer would not be liable - the subject matter being cognizable by & the person amenable to the Court (the cause of action having arisen within its local limits) 10 Co 76 2 Wils. 385 - Esp 391 1 Lev 95 Stra 710

Exemptions from arrest are sometimes in Engd connected with

the character of the individual - Co. Ent. - Sometimes it arises from temporary circumstances or particular privilege - as the (the privilege of a suitor extends to his horse money & necessaries) 4 Com 475 4 Bac 222 - 2 Roll. 273 1 H.Bl 636.) attendance of a suitor or witness on Court &c - In the latter cases the arrest is not illegal in the first instance but a supersedeas issues (4 Ba 222 8 Mo 534. Bl.R 1142.13 4 Bo 377) after (4 Ba 171 Cro 379. Doug 649.52) which detention is illegal & actionable - qu - against the officer or P. only? (Doug 652 - Cro J 379 5 Ba 171 4 Mo 684 J.N.B. 236. 6 Co 52. Cowp 9.) against the party & officer I conclude (5 Ba 171. Cro. J 379 4 Ba 684 2 Bulst. 97.) What is said by Buller Justice Doug 652 must relate to the action after the supersedeas for the prior detention in case of a peer -

In Ct. a writ of protection is commonly obtained in these cases - this is a supersedeas as in Engd. - Arresting one protected is therefore false imprisonmt. (but not till the protection is shewn) The writ in these cases is good & the suit continues. 1 Rob. 220 Bl. R 1193 - A Suitor of S.C. is arrested while attending S.C. in a suit returnable to C.C. - C.C. will not discharge him from custody on that account. John & Landon vs Brumann Norton C.C. Sept. 1816

Arresting a Peer or certificated Bankrupt - officer not liable - bound to obey the writ - party may be in "Case" (Doug 646. 50 10 Co 76.) qu. In Case or Trespass? 2 Bl R 231 Esp 530) Privilege of suitors disallowed in case of collusion - So in reputation suits (Bl R 1193 11 Mod. 79. Cowp 9. 1 H.Bl 636) it being discretionary with the Court to allow or not - So when a party attends as a volunteer upon a pretence (or with a view) of answering

8

In this action dft cannot justify arresting the Pltff
by virtue of process in which he was wrongly named
unless Pltff were known as well by one name as the
other 1 Maul 131 8 East 228 7 Lucas 832 Cole 460
English Trim name is unknown & he is arrested by fictitious
one. 2 Camp 270 2 do 110 6 B.& C 234

By N.Y. a Justice has jurisdict.n to issue a summons in all cases where deft is a freeholder or an inhabitant having a family in the County where the Justice resides — if Justice issue a warrant instead of a summons the proceedings are not coram non judice & deft can only object before the Justice or have error 16 Wend 23. (cites 6 do 597. 5 do 170) Justice Marcus dissenting & cites 7 Johns 75 15 do 152 10 do 162 1 Cowen 316. 19 Johns 33 6 Cowen 221 9 do 227. 11 Wend 627 1 Ct 40 4 do 107 7 do 482.

proof when there is none. Sal 544 -

Party attending arbitration under rule of Court comes within the exemption 3 Cook 89.

Gaoler detaining prisoner for fees the attorney entitled to a discharge - not false imprisonmt. (5 Ba 171 2 Burt 53) Same law in Ex - Terms as to bond - Sent, 1 Root 158.

If the order of Court is to confine in one prison confining in another is false imprisonmt. 5 Ba 171. Sal 408 5 Mod 295 3 Sal 29 -

A Peace officer is justified in arresting without warrant on reasonable charge of felony tho no felony is committed (Cang 334. 45 4 Ba 519. 1 Roll. 113) Semble of a private person - But if a felony has been actually committed a private person suspecting another to be guilty on reasonable ground & without warrant is not liable for arresting & taking him before a magistrate if there be no malice (Esp. 334 5 Ba 171 Cang 345 1 Root 66) So to prevent a breach of the peace or an escape 1 Burr. 150 2 Hawk. 82 -

An original arrest on Sunday being void by 29 C. 2 c. 7 St. Ct. 370. is false imprisonmt. (Esp. 324 605 5 Mod 95 Sal 78 2 Ld. 111 4 Ba 456 1 Bl R 265 Bl. R 1105) Such arrest good at C. L. Bl. R 1105 3 Bulst. 72 -) But bail may take their principal on Sunday (Holden contra as to bail to the Sheriff (Bl R 123.)

for he is in nature of a gaoler - principal as a prisoner & the retaking by bail as a retaking on an escape. such arrest under an escape warrant is lawful (Bed 626 - 3 Bed 118 Esp 605 qu. Bl R 1273)
Arrest in civil cases by breaking outer doors of ptes house is false imprisonmt. (5 Coke 93 Cowp 1 Mod 62 2 Ba 367)
Inner of inner doors - 2 Mt. N. 489 2. Pla 15.

It has been questioned whether if an arrest is made by illegally breaking the house the arrest is good & the only remedy by action - or whether the ept. itself is void & may be set aside in a summary way by discharging the person arrested (Cowp 1.9. Esp 604) - not decided - Said the Court's interference is discretionary - this was a case of breaking doors Co 2 908 Risby 383 - ~~Semble, trespass false imprisonment~~ 272

Lime decided that the ept. of the process was void in case of property taken by breaking doors & ept. set aside. 2 Ber. 67 2 Sw. 285 con 20 5 Coke 93 2.72.

In case of breaking doors false imprisonmt. lies - diff from the case of a bailors privilege &c - arrest at initio illegal - Mod 62 Cowp 1.9 -

Also questioned whether if an illegal arrest is made in consequence of which another arrest is made which would otherwise be good the latter is good - it is valid unless some collusion (Bl. R 823) Aliter if there be collusion - Semble. (Id.) 273 -

Besides an officer by escape warrant may retake the

If a debtor be arrested on an exⁿ issuing on a dischⁿ judgt the party & atty producing such warrant are liable in false imprisonment whether they knew of the discharge or not 5 Hill 242 See wil 2 Ld R 900 Hob 205. 266.

Since 4 Bos. 136. that Dept will be dischⁿ from the P arrest when made during a detention under a previous illegal one 3 Hb. 1139 3 Mich. 461 cited

But if personal propy. is not tendered until after arrest on final process officer not bound to take it 1 Rod 124

Sais in 4 Bouvier 644. that an officer is not justified in taking the body without searching for property - i.e. he is liable in trespass in such case if there is personal property suff. which he might have found on search

prisoner in another State (1 Root 107) The warrant is of no use as to bail prise from another State 5 Esp. R 172 in R 89. 88 P.R 4 b. 54

If an officer by mistake arrest B instead of A. he is liable for false imprisonmt. – So even if B declared himself to be A (Doug 42 2 Roll 522 Moor 457. Esp 328 3 Com 490) qu. Damages mitigated?. Esp. 328 Selw. 078 L. 66

In Ct. arresting Ptff. long on mere or final process in civil cases when suff. personal property is tendered is false imprisonmt. 1 Root 120 2 Sw. 191 5 Ba 191 – in H.Ct. 250 P.R 31

Any person has a right to arrest another who is fighting (5 Ba 191 1 Haw 136 2 Sh 84) & to restrain him till his passion is over – In some cases femes Covert tho liable to be sued with their husbands cannot be holden under arrest on mesne process (Stra 1272 1 B R 486 Bl. R 720) Not there is no instance of false imprisonmt. but in these cases (Doug 648 ang.) Can it be bro?. (Sal 115 2 Bl R 1 19.) Semb. not – the process is legal tho the service is sometimes set aside & the feme discharged – (Bl R 1193 analogy Doug 648 ang.) original arrest not illegal

Arresting & confining one for a short time under a pocket warrant from a Justice for examination is not illegal 5 Ba. 172 Roll 186 Moor 408 vid. Cro E 829.

False Imprisonment

A private person may without warrant confine one disordered in mind & who appears disposed to do mischief. 5 Ba 112

If an officer make an arrest on a process from the face of which it appears the Court has no jurisdiction, who ever it be is liable to amends to the current of authorities (Esp 391 Bull. 82 Hand 480) from whatever cause the defect of jurisdiction arises (Ld Ra 230 contra id. Comb. 20) But the rule has been extended much further for it has been holden (without any regard to defects appearing on the face of the process or not) that when a Court of limited jurisdiction has no jurisdiction of the cause (from whatever cause the defect of jurisdiction arose) the officer would be liable (10 Co 76 Cro J 324 Esp 337) (Decision & reasoning in Marshalsea case — Reasoning contradicted in L. R 230 Stra. 710 509) Coke supported in 2 Wils 380 Esp 398.) Decision in Marshalsea case seems still to be law in Engd — viz — that where the Court issuing the process has no jurisdiction of the subject matter every thing done under it is absolutely void whether it appear on the face of the process or not. Esp 391 Bull. 82 Vent 333 Comb 112 Hand. 480 Stra 710 qu. 2 L.R 653 — Esp.

But when the Court tho of limited jurisdiction has jurisdiction of the subject matter & the defect of jurisdiction is from something local or personal the officer is justified unless the defect appear on the face of the process (Comb 20 5 Ba 180 2 Mod 196 1 Vent 369 Bull 82 Carth 274 2 Ld Ra 29 3 Ba 233 Esp 391 Hand. 480 Stra 710 & according to L.R 230 Comb 20 he is not liable even in this case — for the original Ct. ought to have cleared it (Bull 83 Com. 10 Co 76 B 54) A. to case

A ministerial office is protected in the exn of process no matter from what court it issues & this, the Court have not in fact jurisdictn of the case if it appear on the face of the process that the court had jurisdn of the subject matter & does not appear but that it had jurisdn of the person 5 Mand! 170 Lee 12 Johns 257 15 do 144 1 Peters 340 for liable p 2 Cranch 331 for a contrary opinion of this principle & its extent/

So where one issued an exn regular on its face as Justice of the peace altho he was not a Justice yet the officer acting under it was holden justified 5 Mand! 233 cites 7 John R 549 3 do 486 12 do 296 4 T R 366 2 Camp 131. 7 Mass 231 10 do 290 3 Camp 432

Who process regular on its face will justify the officer yet if in order to justify a seizure of goods he is obliged to attack a sale made by the debtor as being fraudulent against the creditor he must show all the previous proceedings for the issuing of the process to have been regular 5 Wend 194 ind 20 Pick 411 16 Wend 514 23 do 480 15 Pick 391 C & H notes to do 1011

Where a St. provides that where a tenant holds over that the landlord on oath made may have summary process to obtain poss.n if the magistrate issue such summary process where such relation does not exist he is liable in trespass having no jurisdict.n 5 Mand. 284

A Justice in issuing process acts ministerially & if he acts under the direction of the party he is excused As where a St. provides that no freeholder shall be arrested without previous summons or order upon oath made that he is about to elope out the country. If the Justice under direction of the party issue a warrant without previous summons or oath he is not liable 8 Mand. 597.

of Common Plea, 3 Will 345 Esp 329 2 Red 705 844 2 Will 384 2 Red 213 6 Co 54

The officer may justify under the command of Court of Westm. tho the writ be void - except when the Court has no jurisdiction of the subject matter. 10 Co 76 Bac 54 3 Will 345 -

In Ex an officer is justified unless the process is void upon the face of it Ruly 110 82 2 Sw 387

When the jurisdiction is complete & the process is malicious & unfounded the officer is justified (2 TR 231) tho the Court or party as the case may be are liable Stra 710

Where the Court having jurisdiction of the cause proceeds erroneously or improperly still if the process appears regular the officer is justified Stra 710 2 TR 231 (7 TR 455) 3 Bar 333 2 Mc N 488 3 Will 345

Rule in Eng. according to the weight of authorities seems to be that when the subject matter is out of the Court's jurisdiction (whether the jurisdiction is genl. or limited) process is void & officer liable - Aliter where the want of jurisdiction is as to the person or place there the officer is not liable unless it appear from the face of the process - non tam in case of Courts of Westm. — But the latter branch of the rule tho true as to mesne applies not it is said to final process (issued by inferior Courts) without qualification - & where arrest

is under final proceß of inferior Courts the officers justification must shew that the cause arose within the jurisdiction - or at least that it was so laid Bull 83 Cro p 20

But tho the proceß under this qualification justifies the officer it does not the original Pltff. - he is bound to know the extent of the Courts jurisdictn. & to shew it & where the cause of action arose (Cro. J 314) & the original Pltff (now Dft.) is not bound by bearing plead to the first action (Esp 330 Bull 83 & Bac 130 1 Vent 369 2 Cont 260 2 Mod 196) Ld. R 230) denied that even original Pltff is liable in this case. Sutw. 937 156 1 Vent. 236 case cited vid Cro p 230 (Ld R 230 appears in this point by Law & Ellsworth Sc Rule 111.

In some cases the proceß is void & the Court & party liable where the jurisdictn. of the Court over the cause is complete as to the subject matter person & place. 1. In cases of limited jurisdiction - by where an authority given by St. is not strictly pursued (Esp 331 & Co 114 Sel. 408 Stra. 710) where a Justice committed Pltff. - for killing game tho he had suffit. effects to answer the penalty officer excused - but the illegality of the warrant was not patent (1 Wil, 153 Esp 332.) where person was convicted on St. penalty £13. which he offered to pay but was imprisoned by officer till he paid the fees which the St. did not allow -

Here the officer was Dft. - this was for abuse of proceß - no questn. of jurisdictn. - So against commissioners of bankrupt for any committment not warranted by their St. powers - Esp 331. Bl. R 1035 1141

It is a good justification in false imprisonment that Pff was arrested by deft without warrant that he was arrested in the perpetration of a felony or misdemeanor or for a felony already committed but a private arrest without warrant cannot be justified for a misdemeanor already committed 23 b & l 187 Hawk B2. Ch 12 s 20 Hale Pl. pt 2 ch 10. 88 89

1 Ld R. 458

In a warrant to apprehend for a crime it is not necessary the authority to set forth the cause for which the warrant issues but unless such cause is set forth in the warrant to convict the magistrate issuing it is liable in false imprisonment q Mand 63. 1 Ch. b & l 141 1 Hale 580 2 Ld 111. Leo I 41 2 Miller 158 pl Bac. Trespass 574

False Imprisonment

2. So in other cases the process of even Superior Courts (or any Courts) arise from any objection to the jurisdiction of the Court is void & Pff in the process liable to this action - Irregularity - Ex. Ca. capias returnable to the next term but one to that of the date (Ex. p. 328 3 Com. 491. 3 Dil. 341 Bl. R. 845 Sal. 700 1 Roll 315) (officer not liable (3 Wil. 345.) -) in this case if the process is from the Courts of Superior & the irregularity appears on the face - Same rule probably in Ex. qu.

3. So tho the original arrest were lawful yet for any subsequent oppression this action lies against the officer or magistrate if he be in fault - Ex. Wanton cruelty (Ex. p. 832. cited 13 R. 636.) committed by military commanders - jurisdiction of magistrate here also special -

When an officer justifies proof that he acted as an officer is suff. as to that fact - he is not bound to shew his appointment (Stra 1005 3 B.R. 632 4 Bbb 2 McN 485.) qu. May not this be rebutted?

Gen. rule - An arrest under an irregular process is void - So under process of arrest founded on an irregular proceeding - Ex. Arrest on an ex. issued on a judg. set aside for irregularity (Ex. p. 329. 91 3 Bat 128 Stra 509 4 Bacy 73 1 Sev 95 1 Sid 272 1 Wil 155.) Said that the officer serving the process is not liable - (Ex. p. 391 1 Wils 345) qu. if the Court is of limited jurisdiction & the irregularity appears - Stra 993 -

False Imprisonment

But an arrest on an erroneous process is good (4 Bac 450 Stra 509 3 Wils 345 Esp 391) hence party may justify under erroneous process till it be reversed 3 Wils 345

Process has been holden irregular & void when filled up without proper authority - Ex where in Eng. the under Sheriff left a blank for Atty. to fill with the name of a bailiff (Esp 329 2 Wils 47.) The person sued here was the person serving the process - it does not appear that he knew of the irregularity - Superior authority Ex Sheriff warrant - See in Ex. St 24.287.

Writ directed when directed to an indiff. person unless the magistrate inserts the name - So a writ drawn by a Sheriff unless in his own case -

So where "process has issued informally" - process out of the V. Chan. of Oxford without original Pff making oath of his cause of action & that he believes so - he swore that he suspected so (Esp 329 Stra 993) - the party & court officers & goaler holden liable - Strange adds the officers & goaler might have justified - denied 2 Wils & the whole said to be coram non judice

Officer it is said is not liable if he was not joined in pleading with the others Stra 994 questioned 2 Wils 385 -

So where the writ is not returnable on a day certain

False Imprisonment

- irregular - (Esp. 330 Co. S 314 Cy. 262 2 Bulst. 36 1 Mod. 81) But this rule applies only to mesne process (Comyns) & has once been denied even in case of mesne process (2 Mod 38 Comyn 21.2) & "next Court adjudged suff." - Sales quoad to our Supr. & County Courts which have stated terms established by gen. law & 1545

Arrests under gen. search warrants are illegal - so are gen. warrants of any kind - Ex warrant to arrest "the authors of a libel" whoever they are - Esp. 399 1 Hal 150 2 Wils. 245 Rich. 213

Requisites of search warrants - 1 Granted on oath - 2 - the grounds of suspicion declared - 3 - executed in the day time by a known officer & in the informer's presence - 4 - directed to a particular place & against the particular person in whose posn. &c. & when these requisites are observed the informer is justified or not by the event. Esp. 399 2 Wils 291 - Hal P.C. 150

When the officer serving process justifies under it he need shew only the writ or process itself (Esp. 333. 6 Co. 52 2 Roll 563) & that it is returned if mesne process (Esp. 337 Stra 1184 vid. Comyn 20) & the return day has arrived

In Eng the Sheriff's under officer is not obliged to shew the return - for it is not in his power & the necessity of the officer's shewing a return obtains only in case of mesne process Comyn 20 5 Co 90 4 b 1 Wils 17.

False Imprisonment

But if the original Pltff is Defdt he must shew a judgt as well as exec. in case of final process (Esp 333 Sel 1108) for judgt may have been reversed before the arrest & original Pltff ought to take notice of it – Same rule where the action is against a stranger who procures the service of process against another – Semble if he acts in aid of the officer & at his request (Ld. Sup.)

So if a Sheriff does not return a writ when he ought to do it – (or makes a false return) he may be treated as a tresspasser ab. initio (5 Com 581 2 Roll. 563 5 Ba 1162 Sel 1109 Str R 832) tho this is mere omission – for the return is necessary to complete & validate the arrest

If original Pltff & Officer are sued together they may sever in defending & if they join & the plea of justification is insuffct for Pltff it is so for the officer – (Esp 336 Stra 993 1184 509) So a converse if the plea is not good for officer & would be for original Pltff he loses his defence by joining (Esp 336 Stra 1184 1 Roll. 19.) – Ex. Officer does not shew the return of the process &c when he ought

Procuring – commanding – aiding or assisting makes one a tresspasser Co 8 57. 1 Sel 1109 2 Haw. 512) Servant keeping the key of a room knowing that one is imprisoned in it is guilty of false imprisonmt. (3 Wil. 377. 5 Com. 579 1 Smt. 57.) Procuring a foreign prince thro fear to imprison is false imprisonmt. in the procurer. Bl R 983 1055 – The form of the action in these cases is tresp. vi et armis –

If parties state a case for the opinion of counsel a
agree to abide his decision & opinion thereon is this
a submission 39. 6 L. 68 where it is strongly intimated
not to be.

If an agent submit in his own name or if one without authority
submit they are bound by the award 5 Hill 420 Watt. R. 50
Bac. Abd. 6.

Awards

Submission

The power of Arbitrators is originally indefinitely large, & the submission is not as is by many supposed an enlargement of their power, but a restriction or specification of them

Formerly holden that if any collateral thing not money was awarded, no action could be maintained & of course the award was void - but it is now holden that the bond remains good & an action on it is maintainable -

Formerly holden that if one undertook for an infant that he should abide an award, such undertaking was void - forsooth the Judges the Submission of the infant was in the first instance void & of course an undertaking that it should be fulfilled is void - But this doctrine is now laid aside for the same reasoning would apply to the indentures of apprenticeship of infants 1 Ch R 279 1 Eq. R 49 Contra Settle 207 Bond 388 / for a guardian may submit on behalf of his ward & the aid wife be wardens 3 Burnes R 203 Kirl, 215

It has been made a quest. whether a submission may be pleaded in bar to an action but for the matters submitted after submission entered into & before an award made - Ellis R. thinks it no bar for the very act of instituting the action is a revocation of the submission

A Bond in any contract that all disputes arising on such contract shall be decided by arbitrators is not a

submission which can be pleaded in bar to an action. 1 Leon 37 1 Ld. 129 2 Ch. 585 - 589 2 Bro. C 336 2d 311 Des 129 Hiac. 18

Parties cannot be precluded from pursuing their remedies at law by any restriction laid on them by those under whom they claim 10 Mod 59 Ria 21

An Atty. may not submit a cause in his case without an express authority from his client, unless it be by rule of Court

A husband may submit things in right of his wife - but he may not submit realties - If A marries B - at the time of the marriage B had rented a farm - A submits a dispute concerning the rent & dies - wife B not bound - for rent unpaid is not the husbands of course he had no right to submit it Ria 24 See qu. C 1436

An Ex.r can be bound by an award against their testatorse - tho it was formerly a question. Cro C 600 Ro R 248 2 Vent. 245 -

If an Ex.r submit a dispute as Ex.r - he is liable on the award only as far as he has assets & the mere circumstance of entering into a submission is not an admission of assets - but if he bind himself his ex.rs & adm.rs he is personally liable for all which is awarded against him 15 R 591. 5 & 8 Ria 40 -

If two or one part submit jointly one alone cannot revoke

No action lies on the penalty of a bond for the mere performance of an act when the act is not made within the time specified in the cond^n of the time was enlarged by the subseq^t agreem^t of the parties the remedy must be had on such subseq^t agreem^t 9 Johns 115 3 Hill 592 5 Cowen 191 8 Johns 392 Reid 3 Johns R 528

On a submission of all demands a demand omitted by mistake to be brought before the arbitrators is as concluded by the award 12 John 318 15 East 213 2 Br R. 435.

A submission of a cause pending in court is a discontinuance of the suit whether the arbitrators act or not 2 Mend 506 18 John 22. 6 Cowen 399. 1 Mend 314 17 Mass 591 20 R 591 2 John Ch 276. 317. rid Keyd 14

Selectmen without authority from the town cannot submit to arbitration 2 Day 323. 327 1 Ch 183 5 Ct 371 - qu 11 Mass 447

Nor can one of several partners bind the others by a submission of matters relating to their partnership concerns 11 C L 50

2 Rol 64 Cy Rid 30

If a submission by penal be revoked as no bond is forfeited no action on the case will lie for such revocation. 2 Rol 10 20 21 Contra 1 Rid 284 8 Co 82

A Court after a revocation will not save the penalty of the bond 3 Rol 745

A party cannot revoke a submission by rule of Court even with consent of the Court 1 Sal 73 / A bond of submission cannot be revoked by rule of J. 8 Johns R 125.

If one partner submit for himself & co-partner the one submitting only is bound. 2 Mod 228 Rid.

All disputes concerning property may be submitted the titles to realty cannot be transferred by arbitrators yet if they order a conveyance a remedy for non performance may be had on the bond – a title to real property might be transferred by arbitrators were not deeds necessary, Rid. 34 Ed 2 Sm 11 Ruly 64 St. Ct 1841. P. 35.

Formerly said that a ~~mere~~ debt certain as a bond &c was not arbitrable – 2 Sm 12 difficult to imagine how any thing certain could admit of dispute – the doctrine laid down is false &c – for it never was pretended that certainties mixed with uncertainties might not be submitted Co. 6. 43 1 Sev 291 Co 3 –) A submission by bond provided the award was made on or before a certain day the parties cannot by agreement enlarge the time 2 Ala 392 3 Ala 592

Awards

Arbitrators and Umpire

Infamous persons or those interested may be arbitrators - Persons who are not of discretion may not be arbitrators as insane persons - the infamy is no cause why a person should not be an arbitrator unless it be proved he was not of discretion. Ryg 2 Sw 18

Persons under the control of others may not be arbitrators. Ex. Same contra. Sedqu for persons may be arbitrators in their own cause. Hand. 42 Hyd. 72 Cond 218 4 Mod 226 - 2 Sw 13

An Umpire is a person appointed by the parties or by the arbitrators if the submission empowers them - to determine the controversies if the arbitrators themselves cannot Ryg -

If the Arbitrators appoint him they must exercise their judgt. & not determine by chance. 2 Vern 485 Ryg. 76 -

Been questioned whether an Umpire can make an award before the expiration of the time in which the arbitrators could have done it - settled that he can & if the Arbitrators make no award his shall stand & be good Ryd. 47. 50 2 Ver 100 1 Sid 428 454 Ld. R. 187 Arbitrators are to decide according to allegata et probata & their decis in is final. 9 Johns R. 38

Once holden that the Arbitrators could not appoint an Umpire until the expiration of their power & if so they could not appoint at all - Now holden that they may appoint one the best out they do - 1 Leo 134 Ld. R. 691 Cro. 263 Ray 265 2 Mo. 645. 1 Ld. R. 223 2 Johns R. 87 2 T. R. 339 -

Arbitrators are inadmissible to show his own misconduct to impeach his award 6 Johns 138
2 Johns Ch 349 3 Paige 137

2 J. C. 339 If after arbitrators have elected an umpire they join
17 Ld - 405. with him in making his award - it is good considered as
the act of the umpire / 3 Burr 1474 1 B & P 483 / So
if after hearing all the evidence they disagree & state the evidence to the umpire on which he makes his award - without reexamining the witnesses - it is good unless he is required to re-examine before he makes his award 4 B & P 589

P.R. After arbitrators have elected an umpire they cannot proceed on a reference for their authority has then ceased
1 Ref. Prac. C.B. 116 2 Saund 133 b n / Nor can an umpire be selected by lot it must be by choice 28 C.L. 61 9 B & C 624

17 Johns 410

Submission by Bond arbitrators refuse to accept & the parties accept such refusal - they afterwards at the solicitation of one party proceed & make an award held to be void & that the, their refusal merely proved it must be shown in avoidance of an action on the bond for not performing the arb. 2 Cowen 602

Two referees in the absence of the third have no power to act even to adjourn the hearing without consent of the parties & if they do - their adjournment their report will be set aside 7 Wend 534

An umpire cannot be chosen by lot unless the parties consent & when properly chosen must hear the testimony if the parties require it 27 Geo. III

2. 29

Awards

If the Umpire refuse they may appoint another. Lewis formerly. 3 Sev 263. 2 Devon 113. 2 Ward 113 5 Mod 437 1 Show 76

If there are several controversies the Arbitrators cannot decide some & leave the Umpire decide the others. Ryd.

If the dispute be submitted to three or more two cannot make an award unless it be provided for in the submission & even then all must be present for their opinions might influence the others 6 M.&S.R 26 Ryd 67 Barnes Notes 57 (Willes 215 contra) 1 Salk 39

It is the Arbitrator's duty when called out by one party to give notice to the other. If they must strictly pursue the authority given in the submission 6 Salk 18 – 1 id 70 113.

If no time be limited for making the award it is said it may be made at any time but Mr. R. supposes it should be made in a reasonable time

The Arbitrators may reserve to themselves ministerial but not judicial authority. Nor can they delegate their judicial power to others. Ryd. 78 88 2 Atk 519 Bad 79.

If Arbitrators examine without being sworn & no objection is made at the time it does not vitiate the award (1 Bos 91) Nor is it any objection that they examined Ptf. witnesses after the evidence was closed unless it was by Deft management. 1 Bos 95

Arbitrators may award costs 2 Wils 64 4.5 – 222 4

Where the submission is gen. parol evidence is inadmissible to shew that the arb. is a matter not in controversy at the time — } 1 Johns. 38

If the arb. doubt that if errors are found in the calculation thereof the court shall refuse to grant the rule thereof thinks not upon the merits of the dispute but the arb. may be found a valid — 2 Johns R 57.

Arbitrator were to award 1 on alleged deficit in a building
2 on claims for extra work and deduction for omission
3 to ascertain what balance if any was due the builder
the award ordering a gross sum to be paid to the
builder without any decision on the alleged deficit
held ill 32 C L 363

Awards

Of the Award

Rules - 1. The award must not extend to any thing not within the submission - Been questioned whether any collateral article or thing can be awarded to be paid or done in satisfaction of a debt or injury or any thing which did not relate to such collateral thing. Ryd - thinks that no such thing can be awarded - S.R is of a contrary opinion & cites 6 Mod 221 B R 1039 1 Sid 12

If such collateral act be an appendage of the principal thing it may be awarded - As in an award of money if it be also awarded that a Bond be given up or a release be made - Sc Ryd.

Upon a reference by Partners of all matters of controversy the Award may decree a dissolution of the Partnership. 1 Bl R 475 -

There are many obs authorities which consider that costs cannot be awarded - 1 Because they arise after the submission & so are without it. 2 - Because they are uncertain - Seems now - for nothing is uncertain which can be reduced to a certainty Cro J 577. 10 Mod 201 2 B R 845 B 139 Peyce & 223

If the Submission provide that all legal costs shall follow suit & one of the parties be an Ex - & the award be against him it cannot subject him to costs for by law an Ex - is not liable to cost - So if less than 40 shillings be awarded against one party in some cases he shall be liable for less than 40 Shillings costs 3 B R 139. Ryd -

Formerly holden that releases which usually are dated at the time of the award cannot be awarded for it would be a bar to all matters arising between the time of the Submission & award -- Semble now for the Court will not presume any disputes to have arisen within the time - 2 Ellen 309. 3 264. Reg.

Once holden that an award to do an act to a stranger was void on the ground that it could be of no advantage to any one - Semble now - for the law presumes an advantage & will not set aside the award without some proof of its unreasonableness 5 Co 77 Dr 123 Reg.

An award of any thing to be done by a stranger is void for such part only & good for the residue unless in some case of which post) on the ground that the thing to be done by the stranger cannot be compelled to be done by the party against whom the award is 10 Co 131 -

2. The award must comprehend every thing submitted - Not to be understood by this that if the award is not as full as the Submission it is of course void - for the Arbitrators need not hunt for awards generally between the parties. but if matters in fact are not before them & they refuse to award concerning them the award is bad - 4 Br. 146 8 Co 96 Cro 3 354 200. 298 Reg.

Formerly holden that in case of a Submission with an it is agreed or provided that the award be made of all the premises if the award was made of part only of the controversies whether

In an action on an award a mutual submission must be alleged & proved 14 C.L. 72 2 Stra 923 2 Saund. 61 n 2

An award is published when the arbitrator gives the parties notice that it may be had on payment of his charges whether reasonable or not 27. C. L 117 cor Maudslay & Dunkin 9 Bing 605

An awd. performd. will be a bar to an action submitted for the matters submitted & awarded upon until regularly set aside nor can Pltff in such action attack its validity 1 Day 130 Cid 162 B

If the submission stipulates that the death of a party shall not vacate it an awd made after such death is good 15 C. L. R 31 17 Ves 232 4 Burr 143 3 Ch 30.

more were lost before the Arbitrator or not it was held - Semble, now - ita quod makes no difference - But if the controversies are particularly specified in the Submission without ita quod the Award must be made of the whole - So says Mr R - & Keyd - if there were no ita quod - for it is the intention of the parties that all such controversies shall be settled & on this condn only they submitted - But the weight of authorities is contradictory to this opinion -

If in such submission the Arbitrator award concerning some thing not specified the award if gen. is bad - Semble if so particularized as to be separated - the remainder is valid - 8 Co 98 Burr 274 4 B.R 146 Cro E 216 Cro E 858 Cro J 200 2 Vern 100 Keyd

If A & B on one part & C on the other submit all their controversies the Arbitrators may award concerning the private concerns of A & B on one part & C on the other & also concerning the private concerns of A & B - qu. Is it the parties intention - Mr R. supposes they would have power only to award concerning the joint controversies of A & B on the one part & C, on the other Comb 547 1 Vern 259. ited 2 Ch 646.7.8.

Requisites necessary to appear on the face of the Award

1. It must be of a thing lawful to be done 7 B.R 78

2 It must be to do a thing possible - i.e. a physical or natural possibility - for if it be awarded that a person do an act

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which may be very inconvenient &c it is good & stood 2/3 -

3. It must be reasonable - (3 Bac 153 - Ryd) formerly holden that if damages were awarded which could not have been recovered at Law the award was bad - Cro Eliz 12 2 Deut 243

1 Bacon R 304. certainly tho a common intent is suff. Ibid 2 Bacon R 235 ing and to pay the costs of arbitration & the award not has been depending without stating damages is void - Ibid 7 John R 113

4. It must be certain - tho if it can be rendered certain from the context or by agreement it is suff - for id certum est &c, 7 Mod R 73 Burn 227 Cro E 432 Salk 71 3 Bac 77 Ld R 234 1076

5 It must be final - i.e. that it put an end to the controversies submitted only - & not make an award as can not be executed. Cro E 432 Cro J 200 1 Bacon R 304

6. It must be mutual - i.e. it must be advantageous to both parties - not meant that something must be awarded for & against both parties - Ld R 246 Roll 10.11 Ryd. 2 Bacon R 320.

not necessary that releases be awarded so long as it can be determined for what the money was paid. Cro J 354 Burn 227.

If Arbitrators award a sum of money to be paid the Law presumes it to be paid in satisfaction of the controversies submitted - tho formerly said it could not be known for what it was to be paid - 8 Co 98 Cro J 354 Ryd / 2 Ld R 57

Non legal objections appear upon the face of the aud. it is final & nothing delivered can be received for evidence except mis-conduct or corruption of Arbitrators 2 John R 62 Sir 363. 10 R 163. 8 Bacon R 166 2 Sc 63 Willy 353 / 8 Bacon R 354

The awd. must comprehend every thing submitted & not be of a part only Ryd 172 y East 81 11 Johns 106 suffit if the thing awarded necessarily include those submitted

13 Johns 29
Ryd 282

If on a gen. submission of all demands a part are by mistake omitted to be brot. before the arbitrators the awd. is conclusive 2 Ct R 434 12 Johns 311. 15 East 213

An awd. is to be considered as published when the parties have notice that it is ready for delivery on payment of reasonable charges 20 E L 395 from which time it wd. seem the arbitrators may retain the award until he is paid his reasonable charges.

Awds are now construed liberally 14 John 103.

If any matters submitted are not awarded upon the award is void 29 G 2 205 Burn. 277

Where it was stipulated that the costs of suit should abide the event of the award & the arbitrator decided that deft should deliver Pltff certain goods & Pltff should pay deft a certain sum upon which proceedings in the suit should cease & each should execute a release to the other the awd was held void the reason being that each must pay his own costs 29 G 2 335 5 B & Ald 848 4 East 497. 4 Term Mun 788. vid 5 B & Ald 1403

1 Brown 121.2
Ryle — 244
13 John 264

1 Roll... 259
1 Saund. 32.
324. n. 2.
2 Saund 61
127. 293 bn 1

Awards

Construction

Awards were formerly construed with the same strictness as judgt. – nothing presumed (Brown 192 Yelt. 98) Now construed according to the apparent or presumable intent of the parties & Arbitrators when it may be done without interfering with the rules of law Palm 108 3 Bulst. 66. 67 Mutty Billed 35 Ld Ro 605 612 2 Lawes R 320. Ld 59

Formerly if a submission have specifically stated the causes of difference & the Award had ceased that all actions should cease it would have been considered bad on the ground that the Arbitrators had no power over all actions &c –

So formerly holden that if the award was bad in part & good in part it should be bad in toto – Afterwards holden that the said part only was void & the residue valid –

Present rule – If no injustice will probably arise from admitting the good & rejecting the bad it shall be done – But if injustice will probably arise – whole is rejected – so that the effect of such award is only considered – If an award be so circumstanced still if the party in whose favor the Awd. is is willing to accept of that part which is good in full satisfaction the other will be compelled to perform – So if the party against whom the Awd. is tendered a performance of the whole Awd. both good & bad the other shall be obliged to accept it – no injustice – Rolling 2 Roll R 26 Cro E 232 2 Lev 6. 3 Roll. R 190 3 Lev 62 Cro E 758 2 Keb. 759 Rya

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So holden that an Awd. void in part & good in part is void as to all if justice cannot be done – As if the submission particularly specify the controversies & the Arbitrators Awd. concerning some matters not submitted also without reserving the damages but include all in one aggregate sum the Awd. shall be considered void as to the whole – manifest injustice – Sems if the damage for each particular controversy were specified so that the void part might be severed the good part would have been considered as valid – So also if an Awd. on one part be good & certain & on the other so uncertain that it cannot be reduced to a certainty the whole will be void – As if it were awarded that A should pay B £20 & that B should pay A what was due in conscience – manifest injustice for who knows what is due in conscience? – so the consideration failing the liability ceases – Cro J 584, 577 639 2 Saund 293 –

Rule – If the party receive the same benefit as if the void part was performed by by the performance of the good part only he never can complain – As if it be awarded that A shall pay B £20 & go on foot to Boston. – here the latter clause of the Awd. being for the advantage of no one is void nor can B complain if it is not done

Rule formerly that if all the formalities required by the submission were not complied with in the Awd. it was void – As if the Submission had directed the Awd. to be made on gilt paper & it was not it would have been void – Present rule – If such formalities are of any the

If the submission provide that the awd shall be made and delivered to the parties a delivery of it to one of the parties is not suffn. - the power must be strictly pursued or the awd is void / 6 Johns 15. / the fact that the awd was made is prima facie evidence that it was ready to be delivered 2 Cow. R. 326 Cro C. 541 Hard 399. 1 P.R.

114

If the Submission provide that the awd shall be under the hands & seals of the arbitrators - if it be sign'd by them but not seal'd it is void - Lev 3. 278 11 Johns R 133 -

least benefit they must be complied with - Sans these need be no compliance

Performance

Been a question whether the award must be literally complied with to save the bond - Mr K. supposes a substantial performance suffs. As if one were directed to withdraw a suit it would be a performance if he suffered a nonsuit Hyd -

So a performance as near as the Land will permit is good - As if a release be awarded to be given to the time of the Awd. - A release to the time of Submission is good performance - for the Arbitrators had no power to order a release to the time of the Awd. -

If the party in whose favor the Awd. is awards a diff. performance from the one decreed he is estopped to say the Awd. is not fulfilled

If money is awarded to be paid & a bond by order of the Awd. entered into to pay the money & it is not paid by the time specified - this is no breach of the Awd. but a forfeiture of the bond on which an action is maintainable - Hyd

Mode of enforcing the performance of Awards

1. An action may be maintained on the Awd. itself - If the action be based on the Awd. when there is no promise bond or note given to abide the Awd. the action must be Debt on Indeb. Asst. -

If in such case the action be Debt it is necessary to allege in the

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defendts 1st - That a controversy existed & of what nature the controversy was - 2d. That it was by mutual consent it was referred to A B & C to decide - 3 - That they took upon themselves the burden of deciding the aforesaid controversies - 4th. Of what nature the Submission was & at what time the Awd was to be made - 5 - the Awd must be substantially set forth & to avoid mistakes it were preferable to set it out literally & verbatim - 6 - That by this means the Deft became indebted to Pltff. in certain sum (as much as the amount of the Awd) which he has never paid to his damage &c - vide 129.

2d. If the action be Indb. Asst. the allegations are in Debt are the same except the conclusion which is 6th. that by this means Deft became indebted & in consideration thereof assumed upon himself & well & faithfully promised to pay to Pltff &c

If the Awd be to do a collateral act or pay a collateral article no action of Debt or Indb Asst will lie but the action must be a special action on the case founded on the express agreement or promise in the Submission or on the implied promise arising out of the Submission - Every allegation necessary in the above cases are necessary in this - & the conclusion must allege "that in consideration thereof he assumed & promised - 2 Ch R 1040 2 Saund 62 b n 5 -

If there be an express promise to abide the Awd such promise must be alleged & also the Submission.

a. When an acc. is pleaded it is suff.t to aver that they submitted themselves to arbitration generally

B 1 Saund 32 · 2 Saund. 61 n1
2 D. 127
" " 61 n2
Stra 923

In gen. suff.t to allege that Pl.f & Def.t submitted themselves to the awd. of J. S. without setting out the submission or saying it was in writing Seem if they are bound by their submiss.n in a diff.t manner from what they would in gen. be subject to - must state the terms of the submiss.n in order to show a liability in that particular case - 2 Saund 61. h. i - 7 DR 352 Burr 280

In debt on awd. Pl.f need state no more than supports his case Burr 280 1 Sean 72 1 Sed. 72 Sith. R. 312 - Seems where bot, on the Submission Oath of sup - L 237 B -

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If the Awd be to pay on request the request must be particularly alleged 1 Saunders 33

In this action of express Cov.t there need be no more than one breach alleged to warrant a recovery yet it is prudent to allege every breach - for no more damages are recoverable than by the breaches alleged appear to be due

If an action be brot on an Awd void in part & good in part & a breach of the void part is alleged with other breaches it vitiates the verdict in favor of Pff. - for perhaps the Jury considered the void part

In an action on an Awd when there has been a cov.t or a Submiss.n by cov.t the same allegations are necessary as in the express Cov.t only that Deft covenanted instead of promised

If there has been a bond to abide the Awd yet an action may be maintained on the Bond - but if Pff fail in his action on the Awd he cannot then resort to the bond & so vice versa Stra 923

If the action be on the bond it may be brot on the conditional or penal part - if on the penal part Deft must if he wishes to avail himself of any legal defect pray over of the cond.n & recite it & then for plea say "there is no Awd"

Pff must reply that the Arbitrators did make an Awd

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allege particularly what it was & also assign the breach — then Deft. demurs which will bring the legality of the Award in ques.n before the Court —

If there was no Awd. in fact Deft. must so aver in his rejoinder by affirming over his plea in bar — So say "no Awd." in a plea in bar means no legal Awd. but to say "no Awd." in a rejoinder means no Awd. in fact

Pltff in his replication must show also that every thing required by the Submiss.n has been done — If there was any thing awarded for Pltff to do the old rule was that he must aver performance — But now he need not aver if the act he was to do was not necessary to be done before he could have any claim on Deft. — So if the Awd. was void as to part he must aver performance of the void part

If Pltff sets forth an Awd. & Deft. thinks it diff. from the real one he may have ayer point out the variance demur — But in this case he must set out the real one — If the variance is material or substantial it is fatal.

Pltff in his replication must not only set out the Awd., but also assign the breach else it does not appear that he has a cause of action (Pelit 153) If he does not allege a breach & goes to issue to the Jury & a verdict is found in his favor it is immaterial.

Deft Pleads no award – Pl. replies setting forth an aw^d. Deft rejoins a revocation of the submission before the pretended aw^d made – rejoinder no departure
1 Johns 205 11 East 187 . Ind contra 1 Leo 85 2 Lev 245
1 Ventr 122 2 Saund 81 Le & c 4 Mod 585
But if the rejoinder impeaches the aw^d – It is a departure because in the first case it shows no legal aw^d – & in the latter it admits the existence of the aw^d
1 Johns 205 3 do 367 —

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If by the Awd. money is to be paid at a certain time & place he must aver that he was at the place at the time & there ready to receive the money &c - in the usual form -

If the Awd. be in the alternative Pff must aver that Deft. had performed neither alternative -

Deft. may also admit the existence & legality of the Awd. & avoid it by other means - 1st - That he has paid the money &c - Or he may aver a waiver of the condn & set it out & aver performance - & in such case Pff in his replication need not set forth any breach.

If the defence is legally set forth on paper but not true in point of fact Pff must traverse - but if they are true & insufft. he must demur

So in all cases the diffnt. requisites of Awards must if not complied with be alledged in due form by Deft - As if the Awd. was not made within the time limited in the condn. tho there was an after condn that the Awd. should be made at such time in this case Pff cannot recover on the bond tho the condn not being complied with he may on the Awd. by virtue of the subsequent agreement.

If the Submissn be by note the action is brt in common form & in such case Deft. must plead that the note was delivered as an escrow to abide the Awd. of Arbitrators -

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then he must set forth the Submission verbatim or in effect & defend himself by reason of any defect in the mistakes supra.

If in this State the Submission be by rule of Court the Awd is the same as a verdict of the Jury & exn will be granted.

In Eng. to enforce an Awd an attachment issues to imprison until performance for contempt of Court - but Deft must be served with notice to shew cause if any he has why an attachment should not issue & if he thinks the Awd to be defective he may upon such notice come into Court & take advantage of such defect by way of shewing cause.

Chy will in some cases decree specific performance of Awards - As if a collateral thing be awarded & a performance on one part accepted the other part will be decreed to be performed

So if an Awd be void in Law if there was a fraud in Deft performance will be decreed - As if Deft informs Pff that he does not mean to take advantage of the defect but will perform his part & in consideration of such promise Pff puts himself to much trouble to perform his part & then Deft refuses - Chy will decree performance. 2 Vern. 25 -

Setting aside Awards

An Awd may be set aside for extrinsic causes - as misconduct in the Arbitrators &c - in such case in Eng the remedy is always in

An award is conclusive as to title of lands 2 Ch. R. 127

But all the arbitrators must join in the award unless otherwise provided in the submission and it is not necessary to the validity of their award that they agree in every question & point made on the trial before them. Ex. hearing is admitted or excluded by a majority of arbitrators. It is suff. if all actually hear & join in the award made 3 Paige 137

When an arbitrament takes place by the mere act of the parties without any order of court it is no obj^n to the ceu^s that it is agt^t law Kyd 185 237 238 3 Comyns Ro 167 9 Johns 212 more especially if the legislature sanctions such act of the parties 14 Johns 105.106 —

If arbitrators refuse to admit evidence pertinent and material to the controversy it is such misconduct as will vitiate their award in Chancy. 2 J.C.R. 405 17 J.R. 406

Upon nil debet to debt on awd. partial or corrupt conduct in the arbitrators cannot be shewn in avoidance of the award 2 Bels 148 8 East 344 3 Johns 56 3 67 9 do 312 or that defdt had no notice of the hearing & did not attend 5 Mend 516 overruling 6. Cowen 103. good defence in Chancy 17 Johns 110 6 Pa 72.

Setting aside Awards

Chancy. tho it may be done in Ct. by pleading the facts which situate before a Court of Law. / 2 Lev 162 3. 3 Bv. 212

There are cases at Law in Eng. in which an Awd. cannot be avoided tho it may be in Chancy. - If the Awd. wants any of the legal requisites before mentioned it may be avoided at Law

Chancy. will set aside an Awd. for extrinsic causes viz. (2 Vern 25 - 485 - 515 - 2 Ch. 149 2 Vez 210 2 Vern 101 251 3 Pl. 362.) There cases are those on which can bring very little doubt - There are others of a less evident nature - As when Arbitrators made an Awd & being doubtful whether one of the parties would abide by it & unwilling to lose their fees declared they would not publish their Awd till their fees were paid which they had apportioned between the parties - one party declared he would pay no fees & the other paying the whole the Awd being in his favor the Court set it aside.

So if the Arbitrators are creditors of the party in whose favor the Awd is & such party is poor - the Awd will be set aside - So if on the face of the Awd there appear a mistake Chancy will set it aside - So if the Awd decree that which no other Court either of Chancy or Law could decree it will be set aside - As an Awd against an Infty 3 Ath 494 2 Vern 705 -

Setting aside Awards.

If one of the parties have suppressed evidence even if it had been to his detriment if the Arbitrators declare that it would have occasioned a diff.t Awd. such Awd. will be set aside – this doctrine might appear to argue that a party should be compelled to give evidence against himself – but as Chancy. might have examined his own conscience the rule is not a hard one

If the Submiss.n be by rule of Court all the aforesaid facts both extrinsic & intrinsic are causes of remonstrance against the acceptance of the Awd. –

In Ct. – the remonstrance must be the first term. In Eqy. – the second – but if the Awd be defective by reason of extrinsic causes which are undiscovered at the time for remonstrating Chancy. will interfere & set it aside 2 Atk 155 –

If the Awd be set aside by reason of misconduct of Arbitrators the Court will compel them to pay costs

One a question whether the Awd. destroyed all former causes of action of which the Submiss.n commenced & if the Awd was disregarded whether the party might resort to his original causes of action – there is no doubt that to disobey the Awd was a forfeiture of the bond – Mr. – thinks the old doctrine which was in the affirmative is bad – If the Award does not create a new cause of action the authorities

(Vid 2 Saw 17. Kirby 353 Court refused to set aside the award because exist – evidence of fraud –

An awd – cannot be objected to because the arbitrator has allowd claims which ought not to be allowed unless the Sy^m appears on the award 22 6 L 405

An umpire having examined his award the, not delivd – cannot make an alteration in the sum awarded 6 East 309 & do 54 23 6 L 60

If the submiss^n is that the awd shall be in writing under hand & seal - not suff to aver it was in writing merely. 2 Saund 62 a Stra 116 1 Bulst 110 1 Roll 245 Palm 109 112. 121 Cro J. 278 2 Mod. 77

Not necessary to make profert of an awd - for it is not a deed or specialty tho indented under hand & seal of the arbitrator / 2 Saund 62 b n5 Sty. 459 1 Sal 73 / it is nothing but a writing under hand & seal Burr 281 per Denison J -

In debt on awd - Pltff need set forth no more than will entitle him to an action Litt R 312 1 Leon 72 Ibid 161 1 Sal 72 12 Mod 534 Lt R 715 1 Burr 280 contra 1 Mod 36 qu / If there is any defect in Deft must take advantage of it 2 Saund 62 b n5

Semble in debt on bond to perform the awd - the Replication must set forth the whole awd - 1 Sal 72 1 Burr 281 But if Pltff in debt on awd set forth the whole awd & it appears departing declar^n is bad Litt R 313 1 Ibid 160 1 Lev 112 2 Saund 62 n5

Cro E 557 Debt does not lie agt an exr or on an end made
.... 600 in the life time of their testator or for the testator
2 Roll 107 might have wager his law in such action — But
if such action is brot & ptf or does not demur
but plead in bar to the action & a verdict
is found agt him he can not take advantage
of it afterwards either in arrest of judt or by
writ of error Plowd 182 a Yaug. 97 100 Cro J
47 Yelat 55 1 Sid 333 2 Saunk 34 n 2

If a cause pending is submitted to arbitration without rule of court such submission is a discontinuance of the suit & judgt. is entered on the awd. it will be reversed the court having no jurisdiction 18 Johns 22 Campen v Clarkson But if it is stipulated in the submission that judgt. shall be entered on the awd. it is good it being considered equivalent to a rule of compromise to that amount Vd v 17 Johns 461

Money paid voluntarily in compliance of an aud. cant be recovered back in Assumpsit 1 Day 133.

An aud. by Rule of C. will not be set aside unless complain be shewn in the Arbitrator 1 Ray 133 –

An aud may be set aside if the arbitrators refuse to receive evidence pertinent & material to the controversy 17 Johns 410 Mis. Coindent –

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say the original causes of action may be resorted to – As if it be awarded that all actions should cease – but this is contrary to the opinions of Mr R. & Kyd P. R. 248 1 Sel 65

Sometimes Deft. may avail himself of an Awd. between Pff. & a third person – As if there was a trespass by two & one trespasser submits to Arbitration & Awd. is made – then Pff sues the other trespasser – he may avail himself of the Awd on the ground that the trespass has once been satisfied –

Deft cannot take advantage of any irregularity or deficiency in the Awd which respects other persons & of which they are not complainers & have performed when such Awd as it respects him is mutual certain & final / 1 Root 149 / qu. If the Awd be against tenants. he may –

Whether the Awd be reasonable or unreasonable it does not affect its validity if there be no misbehaviour in the Arbitrators Bailey 353. Stra 301 2 Burr 701 1 Atk 64

Courts of Eq. can set aside awards for corruption & partiality in the Arbitrators – for mistakes on their own principles – & for fraud & misbehaviour in the parties 1 Ven. R 571 – 1 Atk 64 & 494 5. 1 Eq. C 80 3 Atk 644 Amb. 245 2 Johns R 62 Kyd 354 Bac. Arbit. R. vid Bailey 353 3 Atk 529 vid 1 Root 212

Statutes of Limitation

The Sts. Limitn are generally used as defences to actions which are brot after the time limited by the Sts. – they are intended to prevent the fraud which would otherwise be practised in calling into life old causes of action almost unknown & forgotten – they do ~~not~~ not go upon the ground that the right in good conscience is extinguished but that it ought to have been ~~exercised~~ before pursued

In many instances the St. is waived – i.e. the right may be pursued notwithstanding the time allowed by the St. has expired –

1. If the debt be barred yet if there be a promise to pay it after the St. has begun to run such promise will save or revive the debt. Hilles 309 2 Saund 64 n 6

2 If in the same circumstances part of the debt has been paid the debt is revived.

3 If there has been an acknowledgmt. of the debt after the St. has begun to run the debt will be revived but if Deft. declares he will not pay the Pl. tho' still owes & the acknowledgmt. be of no avail – Burr 1099 Carth 470 Cowp 548 5 Mod 425 Bal 28. (contra 4 Dall 598 sed vid 1 H & R 189 4th 516 5 Esp 81 Peake 93. So an admission by the debtor's agent 5 Esp 145 – 2 Esp 511. 1 242

4. If a man makes a will directing all his debts to be paid those barred by the St. must be paid with the others 2 Pl. 89.

Contra post "

So a conditional promise is suff.t if the cond.n be performed / 1 Salk 29 5 Mod 425 Carth 470 Ld R 389 422 Com Dig 54 2 Saund 64 n b / The effect of the St. is almost destroyed by these decisions — Sends the decision in 2 Salk 421 422 is the most correct that the letter of the St. be strictly adhered to — 2 Saund 64 n b

D

2 Burr 1049 Coup 548 Burr. 2630. 2 Bl. 760

Decided in Pinty 302 that an acknowledgmt of the debt does not revive the entire debt only takes a land out of the statute — Exch. Law p. defe. reports Pinty 310 —

3 Ct R 133

An acknowledgmt. is merely evidence of a promise
11 Johns 147 2 Bos. 760 — vid 4 Bos 20 [17 Johns 331 is
suff. evidence for the Jury to presume a new promise
15 Johns 4 vide 1 Sergt 178.

A decree for the payment of debts does not include
those barred by the St Limn. 6 J. C. C. 266. 7 do
129 —

Including a demd. in the schedule of an insolvent
debtor takes the case out the St Bowie v. Handerson
6 Wheat 524 21. C L 214

The St. Limn. bar the remedy, not the debt therefore if the
creditor obtains possn. of goods (3 Esp. 81) on which he has
a lien for a gen. balance he may retain until the
whole is paid 22 C L 113

In suits by or against Corporations the St. may be pleaded as in suits between private persons 3 P Wms 309 1743 7 J.B.C 129 –

If one has acquired title to lands by pres.n any subsequ.t confession shall not avoid that title 14 Johns

See also 10 Mass 1814 Ramsdell v Causey –

that St. Lim.ns of an other country cannot be taken advantage in an action upon a contract here 3 Cr. R 472 – 4 do 49 – 2 Mas 84 2 Johns R 198 11 do 194 – 10 Bx C 903

unless the laws of the other country extinguish the right of action & make the contract void after a certain time & unless also the parties have resided in such country during the whole time Story Conf. Laws 487 29 C. L 309 –

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5 If a man advertises publicly that he will pay all his debts - those barred by the St. will be deemed to be paid Pl. 385 -

(A promise to pay a debt before it is barred & afterwards it becomes barred tho the time has not run from the time of the promise yet if it has from the time of the cause of action it is a bar in most cases 1 Vent 268 Cro E 209 Cro J 18)

1 The doctrine adhered to by many is that length of time is considered as presumption of payment & that if by any circumstance this presumption can be rebutted the St. can have no effect - As in case of a Bond in Eng - against which no St. runs - if it has been a long time demand Court will consider it as paid & by some mistake left in the hands of obligee - & in such case by E. S. full payment may be plead & length of time given in evidence - S 245.

2 Another ground contended for is that if an indebtedness can be made out it will bring the case within the St -

It is evident from considering the 5 cases (supra) that they could not all have been determined according to the first doctrine contended for - tho the 3 first of those cases might well enough have been determined on that foundation. but it could not have served as a touchstone in determining the two last cases - The doctrine contended for could not have been applied in the decision

decision of the 4th case - for by the length of time it must have been supposed the debt was paid & this presumptn must must have continued till by some circumstances rebutted - But in this case there was no circumstance to rebut such presumption - the decree that all the debts should be paid finishes no presumption - for at the time of the decree the Ct being barred was no debt & must have been so considered - so that he must to have intended that such debts as were real debts or such as were not barred should be paid -

The 5th case stands in the same situation - for the person advertising that he will pay all debts cannot be presumed to mean those which are no debts at all - So in this case there is no circumstance to rebut the presumption that the debt is paid

2 - Were the doctrine contended for in the 2d hypothesis the true one the St. would be a perfectly nugatory thing - at least it could only afford a presumption against Pltff liable like all other presumptions to be rebutted - No right is by the St. extinguished but only is remedy denied. G.M.R.

The true principle which governed in the decisions of those 5 diffn kind of cases & on which one of them might have well been determined as the K. thinks is that Pltff was considered as having waived the advantage the law gave him by which warrant he should abide - - The 5th case on this principle is conclusive for that case there was an acknowledgmt of the debt but a refusal to pay & on the ground of an acknowledgmt only

A. sold B. a quantity of grain which was not of a quality according to contract - B was compelled by suit which lasted many years to pay damages to his vendee - he then sued A. for breach of contract alleging ~~the~~ special damage the sum recovered of him - held that the such special damage occurred within 6 years yet the breach of the contract the gist of the action was known to B. more than 6 years before of the Place of St Louis - was held good 1 Bam & Ald 288 cited 6 John Ch 293 11 Cl & Fin 222 & no matter whether Pltff knew of the breach of duty or not 11 Cl & Fin 185

Does the term "legal dam" mean out of the State?
11 Wheat. 361

In actions of Assumpsit for negligence want of skill & fraud in performance of work — Dft pleaded Ff. of Lim in bar Pff replied a fraudulent concealment of the badness of the work by Dft so that Pff did not discover the fraud until within 6 years before the commencement of the action — Replication held bad — such fraud not preventing the St from running — 20 Johns 43 on ciid Dang 654 3 PWm 143 3 Atk 208 — 4 Cater R 109 — Ded qu v Johnson 122. 1 Bro P.C. 455 3 PWm 113 — that a replication of fraud is ineff. 2 Sch & Lef 634 ciid v Johnson Ch qu 5 do 222. 1 Pick. 485. 6 do 74. contra 16 Wend 477.

A pure plea of the St. is no bar ~~when~~ where there are circumstances stated in the bill which take the case out of the St. unless the answer destroy the force of such circumstances. Beames Pleas 169 2 Ves. 485 Pr. Ch. 385 1 Ves. 485 3 Atk. 70 1 Ball & B. 178. 7 J.C.C. 134

Saund Cro C 115 that if it appear by Pl'ffs own shewing or in evidence that the suit is not brot, within the time Pl'ff must fail - words of the Stat "that it shall not be brot" Hutt 109 Cro C 163 Deft may take advantage without pleading Lowther new Cro C 381 1014 on Pl'ff may be within the exception of the St - 2 Saund 638.

1 Ved. 191
1 Lev. 110
Ld R. 838.
2 Saund 63 n b

or in other words a waived Pff recovered – But tho there was an acknowledgmt. or circumstances to rebut the presumption of payment arising from length of time according to the 1st hypothesis yet had there been a refusal to pay or a refusal to waive the advantage given by the Sta Pff could not recover – So also in the case of the Advertisement & bill – there was a debt due the St. having only affected the remedy – so it might well be intended that it was meant that such debts as well as others should be paid 5 Burr 2630 –

4. Mr. R. seems to found his doctrine on the truth of a proposition laid down in the 3 case it would seem that were the truth of that doctrine denied & proved to be bad law his hypothesis must fall as the other instances (Semb.) will not support his doctrine more than the first one mentioned – & Mr. W's proposition is (Semb) contradicted in 4 East 599 & 239

The St. must be pleaded & cannot be given in evidence under the Genl issue – for it does not destroy the right but only the remedy & nothing can be given in evidence but such as goes to destroy the right – Yea vs. Fonnaher 1 Burr 1099 Bro C 160 141 Ind 1 Ch 476

Been a question whether the action should be brot on the old debt or on the new promise for which the

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old debt is a good consideration at the time of 2 years. Sumner Bun 1099) establishes the doctrine that the action may be had on the old liability - for in that case the new promise was not made till action commenced on the old debt - So it would seem that if the doctrine of waiver were true it must be had on the old liability - for the waiver introduced no new right but only dispenses with the old one - So if it be established that the action must be had on the old liability it supports the Wolfe opinion - & the last decisions in Courts in Ct - & the National Courts are to bring the action on the old liability & so is the law - Conth 470. con - 28.

A debt barred by the St. is a good debt to found a right of signing a Bankrupts certificate -

Also it appears on the face of the declaration that the demand is barred by the St. yet Deft may not demur - for it would preclude Pltff from replying & proving a subsequent promise 2 Day 363 5 Conn 225 -

After the St has begun to run it will continue running notwithstanding the intervention of any of the savings of the St. as infancy - going beyond sea &c (2 Wils 134) Ch. Pl. & the Courts of this State contra 2 Day 223. 5 Mass 53 & 300. 310 2 Mass 209 - so qu. for in the case in Doz the St. never legally run -

If a St. bars a recovery in favor of persons out of the State the liability is removed by coming into the State for temporary purposes 3 Bacon 174 2 Day 523 -

a But this question was not decided in the case ibid. but merely that an acknowledgment of the debt after action brot took it out of the St. 12 R 389

If a St. provide that no writ of error shall be brot after a limited time it operates prospectively upon judgts rendered subsequent to the St. & not retrospectively upon judgts rendered prior to the passing of the St. 18 John 189 9 do 493. 500

26 R 35.

Ft. Lt. . is suspended whilst deft. is out of the State & if both parties reside in another State where the contract is made & until after the remedy there is barred by their St. Lim. a suit may be sustained here if sued within our St. after Deft. comes into this State &c - no time will bar an action here except time running against deft. has resided here 11 Pick. 28

If a claim of title is not founded on a deed or writing the possn. is limited by actual occupation & substantial enclosure definite & notorious 1 Cowen 609 2 Johns R. 230.

A purchaser without notice has a right to join his adversary posn. to the ostensible adversary posn. of his vendor so as to give him the benefit of the St. Lim. 8 Cranch 462. Alexander Pandleton

Where from the commencement to the termination of the current charge, there have been made one in 6 years & the last charge is within six years before the last last, the St. Lim. is no bar 9 Mount 126 7 do 322

Altho, the continuance of a nuisance by flowing lands may confer a right to such lands yet no longer of time will bar a public pro. for the continuance of such nuisance nor a private action for damages sustained thereby 9 Mount 316 4 do 9-25 & Conow 162.3.

A In such case the plea should not be "non assumpsit infra sex annos" but "causa actioni non accrevit infra sex annos" 1 Kent 191 1 Saund 33 n 2. P 63 b n b. the latter way is always the best in cases of debt on simple contract or assumpsit so as all cases where the promise is to performance future 3 Mend 173 1 Salk 156 1 Esp 294 3 Burr 1281 — 2 Saund. 422 2 B R. 838

B Suppose note payable in 10 years after date in such case the st. law from the time the right of action commences 3. Burr 1772. 2 Kent. 151 2 Saund 64 n b

I. Gilles 27. Assumpsit by an ex^r on promises made to testator Plea — St. limit. Replication subsequent promise to ex^r — Rejoinder — replication a departure —

The proviso of a st. permits infl^n to make entry after disability removed if one of several joint owners be under a disability it brings the entry within the saving of the proviso as to all the owners Shipp ex v Miller heirs 2 Wheat. 316 —

A suit abated & not revived takes no time out of the st. limit. 8 Cranch 462

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In Eng the St. does not begin to run until the cause of action has accrued - 24. Note payable in 6 months - St. begins to run at the end of 6 Months, & Semb in Ex - St. attaches when the contract is made if it be an express one B.

Suppose a debt against two is barred by St - if one pays a part of it (or acknowledges it to be due) it is taken out of the St as to both (Esp 155 Cowp 652 H.Bl 347) but against whom must the action be brot? Suo dein wins - contradicts - the last decided that it must be brot against both - on the ground (Semb.) that the action must be brot on the old debt - I 2 Vent 251 - Cowp 630 - vide Bull 145

If part of a Book debt be barred by St - a part not & if payment be made it shall apply on that part which is barred unless there be some particular application of the money paid. 6 B.R 189 Peak. 93 2 Cay 215

In case of torts if the cause of action accrue immediately upon the act done the St may be a bar - Semb if the cause of action arise by means of special damage, St will not attach - Eg Action for words not actionable &c - but (Semb) St. attaches as soon as the special damage is sustained

In Cases the St in these cases run against the cause or form of action? One principle of construing St which

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abridge the R.S. the form of action merely is taken away - vide 1 Bay 100 where it is said - than an action (civiliter) may be brot after a year tho the crime can not be prosecuted after that time -

So in Eng Ejectmt. will not lie to recover lands after the right of profr. is gone - but Pff must resort to his writ of right - for the St - merely takes away the remedy -

Been a questn. what shall be such a profr. as will bar the right of entry - Decided in many of the States that any profr. under a colour of right for 20 years will not profr. in defence - Mr R. thinks the profr. should have some distinguishable marks of ownership - Eg - Gen inclosure &c -

St is by many imagined that the St. gives a right of profr. to mor. after 20 years profr. - erroneous - for any act which shews the parties considered it a mortgage within that time will prevent the St from attaching - Eg Payment of interest &c -

Endorsmt. on a bond do not save it from the St. Sim. 1 Root 239 178
An action of Account is not within the St 2 Root 41

20 years without any demand is itself a presumptn. that a bond has been paid 1 Hob 270. 2 Stra 826. 6 Mod 22. 1 Burr 434
4 Mbs. 252 240. 1 Root 312. 7 Johns 554

No length of time short of that prescribed by the St will be a bar. Sauf 216

Actions on negotiable notes must be brot within 6 years after the right of action accrues. St. Ct. 00 (Ch 1812) but this St will not affect notes [illegible] 4 Pick 193

In any case except assumpsit will a new promise revive the cause of action? 116 L 126 & an acknowledgment unless there be an express promise will not avail in assumpsit 116 L 126 3 Atk 105 2 R 422.

Where one called on for payment of a note admits the note & promises to settle it it is equivalent to a promise to pay it & any subsequ. holder may consider himself of such promise 8 Mand 600 5 Bingh 579 — So of any share in action 9 Mand 297 4 Esp 46 3 Camp 32 56 L.R 245 9 do 49-51 4 Pick 118 5 Mand 257 —

Where the debtor dies before a cause of action accrues & no administration is taken out until after 6 years this may be shown in avoidance of the St. for altho the debt is due if there is no one who can be sued no cause of action hath accrued 156 L R 120 —

The plea of non assumpsit infra sex annos is insufft in assumpsit ccc. S 244 n A

Do a plea of the Pltff. may replay a former process sued out & continued 2 Saund. 73 d n b

A Legacy to a daughter payable on her marriage or when she comes at full age is a debt by herself or husband after the lapse of six years bodden that the Pltff. was no bar the running within the exception in the former statt 1 Ruiga 616 - & if the Pltff. is a good defence to a part of the demand if pleaded to the whole it is bad Ld. vid 1 Bl 40 n

If a party shows title he produces the Deeds & sent into possn. of a corporation a part he gives title to the Deeds by 18 years possn. a possn. of part evidence to produce is a possn. of the Deeds 1 Lo. Ray. 738 Rg 2 n W

Defts. acknowledge the debt & claim have nothing to do with it that he wd. rather go to jail than pay it. Held that it was proper for the Jury to consider whether this was an acknowledgment from which a promise to pay would be implied 29 C L 319 — contra 2 39

Defts instructed his agent to offer Pff a part of the claim in full — Defts refused so to receive it — agent then paid the sum in part discharge. Held not such a part payment as to take the case out of the St. 29 C L 319 —

Where two persons have mutual suits against each other an agreement to discontinue & an actual discontinuance is a good accord & satisfaction & such discontinuance may be proved otherwise than by the record 12 Johns R 457

In an action on an adm^{rs} bond averment that the parties interested agreed administration should be suspended or waived & that with their consent the property was delivered to the widow will not sustain a plea of payment or performance - but such facts if a legal defense might be pleaded as an excuse for non performance or as accord & satisfaction 11 Pick. 145

Accord and Satisfaction

Accord & Satisfaction is a plea very often made in bar of action - i.e. that Pff did agree to receive & in pursuance of such agreement did receive something in satisfaction of his claim diff. from that due by the contract or recoverable in the action

Rule - Payment can never be unless the thing paid was the same as the thing due - it must be pleaded as Accord & Satisfaction. Eg One owes money & satisfies the claim by delivery of a horse -

Acc. & Satisfaction in Ct - may be pleaded in bar of all personal actions - ex delicto & ex contractu - One exception in Eng. which is - if a deed or bond create the duty or give the cause of action Acc. & Satiff. cannot be pleaded - for ex ligamine quo ligatur &c too formerly of payment - but now by St - payment may be given in evidence to show the performance of the cond. & if the bond be single payment even now cannot be pleaded 2 Wils 88 b Co 44 - 650 - L 252

Rule - Where the cause of action does not arise by the deed itself but by matter subsequent Acc. & Satisfaction may be pleaded - Eg Bond with cond. to repair a house & obligor does not simply - on action biot Acc. & Satisfaction may be pleaded - for the cause of action does not arise from the bond but from non performance of the cond. of the bond Cro J 100 254 Yelv 125 2 Wils 88 b

Plea that Pff. accepted satisfaction from a third person or stranger is bad 6 Johns 38. Lord E 5 441 vide as to the law on award of satisfaction 5 Johns 392 n. fr 386 12 Johns 456 - 11 Ves 185 Fort 252 n

Croke. 193

x Sed qu. if the £10. be actually accepted in satisfaction of the £100. but a mere agreement to take a less sum than is due is not obligatory 2 Wms 27. 1 Lev 122. vid Selw NP 136

An agreement without seal cannot operate as a release if the consideration is merely nominal it cannot operate as an award of satisfaction 11 Johns 169.

Accord and Satisfaction

5 Co 117 E, p 230

Acc.d & Satisfact.n cannot be plead to real actions - for the title to real property can be transferred by deed only / 9 Co 79

Rule - The thing given in satisfact.n must be of some value - the R. sees no propriety in this - for he says any act done which would constitute a good consider.n for a promise is suff.t - so if any thing is done which is of any advantage to Pl.ff or disadvantage to Def.t is suff.t
1 Roll. 128

Rule - It must be in satisfact.n. i.e. - if there be any consider.n however small it is suff.t - for the thing given in satisfact.n need not be of equal value to the cause of action - But if it appear from the Acc.d itself that there was no satisfact.n it is bad X as if it appear that £10 was given in satisfact.n for £100 - tho this may be pleaded as a composition (2 Str. R 24) 5 John R. 271 / Sem. as to the interest annexed on a debt - 5 John R. 271 / Ed 448

But if the thing be collateral which was given in satisfact.n the value of which is uncertain or matter of opinion only it is good - Eg. a hat given in satisfact.n of £100 1 Roll 128 Brown 5 Mod 88 Stra 426

The Acc.d must be certain at the time of making it - for if it be then uncertain tho it afterwards become certain it is bad. Yelv. 125 Mod 88 -

Accord and Satisfaction

It must be executed B for a bare agreement is good for nothing - even if one agrees to receive collateral articles in satisfaction of a debt & they are tendered but refused it is no good Accord & Satisfaction & the an action may be had against Pff. for non performance of his promise; Cro. E. 79 1 Roll 129 Cro E 193 B. 5 John R. 386 8 Co E 243
Ac. contra 3 John R 243

It must not only be accorded but also actually received in satisfaction. 5 Ser 141 ed Sup. 32 E.L. 379

The old method in Eng & the present in Ct - of pleading an Accd & Satisfaction is to set out the ~~[illegible]~~ Acc. as it was & then allege it was received in full satisfaction - The modern mode in Eng is only to state the giving & receiving in satisfaction.

Acceptance of a jedgt or a satisfaction for a debt of a debt of an inferior nature is a discharge of the debt. 2 John R 475. 2 Caines 369

A plea of acceptance of satisfaction from a stranger is not good 6 John R 37. - Id 342 - post 252 m

An accord with mutual promises to perform is good for the there be no performance either party may compel it 2 Bl. C. L. 166 Cowd Cond B. 4 32 C. L. 352

The Plea must state the Pltff exact name of the thing in satisfaction ha 573 –

In a pumpsit & bare accord & satisfaction may be given in evidence under the gen. issue 12 R 566 5 East 230 4 E. 181 3 Burr 1333 –

x Poole 412
.... 416
Bro. 399

"Rec^d of A 5s. in full satisfaction of all demands" is a discharge & cannot be given in evidence under the gen^l issue 1 Day 275

A release is good without any consideration seems where it was expected to receive a consideration which has failed Vaughan 408

An action by Landlord & Sheriff for not retaining a year's rent off after the Jury were sworn gave the tenant a release of the rent Held that he might notwithstanding receive of the Sheriff 7 Bing 428

Release

A Release is a discharge in writing – a Discharge is by parol only – & in Eng. a Release must be under seal x

After a parol contract is broken & a cause of action arises thereon it cannot be discharged tho it may be released – A discharge might have operated before a breach – reason – after a breach there has a right accrued which cannot be discharged by a promise without consideration. Cro J 220 Cro E 384 1 Sid 177 2 Mod 114 Ta 205 Cook Plead. 267

A Discharge may often be implied – as if a subsequent agreement be made inconsistent with the former Yelk. 22 –

So if the contract is rendered impossible to be performed by the act of obligee it is an implied discharge –

A Release without consideration in Eng. is bad – yet if sealed it is good – (vide definition supra) for the seal is evidence of a consideration & nothing parol may contradict it – yet if anything appears on the face of the Release which shews it to be without consideration it is bad – 1 Bower 126 2 Johns R 448

The words "all demands" are of the most extensive signification of any that can be used in a Release (1 Saut 291 Cro J 170) for by these a note not yet payable will be discharged it being debitum in praesenti tho solvendum in futuro – See formerly Cro J 300 437 Cro E 606 – J 159

Release

A Contract to pay rent is not discharged by these words. - for rent becomes due by virtue of the enjoyment, rather than by virtue of the contract & so is not ~~[illegible]~~ debitum in presenti Sid 141 2 Sal 578 Port 251 1 Mod 292 Esp 243

A cov. to do a collateral act is not discharged by these words if not yet broken. Cro J 170 2 Mod 281

If A sues B. & C becomes his bail & then A discharges C from all demands & then recovers judg. against B which is returned nonest inv. C is not discharged from his liability as bail - for at the time of the Release there was no present indebtedness but the liability depended on contingencies - 5 Co 70 - 1 Mod 292. Salk 547. vid 3 John 363 - Esp 244

If an Annuity were settled on a woman before marriage for life her husband cannot discharge it - for had he made a Bond to pay his wife so much after ~~marriage~~ his death he could not have released it - Cro J 222 Yelv. 156 -

Very often proof of the subject matter for which the release was given must be introduced to learn the extent of it - tho this is contrary to the gen. principle of Sens 1 Show 150. 155 Coutts 119 2 Ser 215 -

The word cov. in a Release in one instance has a more extensive operation than "demands" - for it will

A cov.t not to sue even when made not between the very same parties is continued a release 2 Johns R 186 Cuyler v Cuyler & do 38 Phelps v Sebenton vid 2 Saund 48 n 1 & 7 A 168

If the holder of a note over due one suff.t indorse. agrees not to sue it within a given time but does so sue it the def.t must set up such agreem.t in defence of the action he cannot sustain an action on his part for a violation of such agreem.t 6 Mand.t 291 cites 3 Johns R 528 1 Johns C 22 Cro E 623 J Bridg R 117 - 9 Johns 244. 12 do 374 1 Cowen 249 3 Camp 57 vid 4 Mod 414 Camp 147 8 Johns 92 8 Pick 297 Perkins v Gilman

But a cov.t not to sue a bond within a limited time Lawes vid 6 Mand 471 L. 141

If a lease contain a proviso that lessee shall not let without leave in writing on pain of forfeiture a parol license will not discharge lessee from this proviso
2 Str 425 Cowp. 47 3 Ch R 590 592 b. 12 Saund 48 a

A Release to one of several joint or joint & several. 8 a 4 Mand 611 8 Ch R 1655
obligees discharges the others & may be pleaded in bar 2 Roll 412 2 Sid 574 2 Saund 48 a 2 Ch. R 125
Sidl Rep. 376 1 Saund 232 a. Hob 10. is a technical release
1 Mand 230 7 John 207 2 Co 44 a 9 Mand 336

Where there are gen. words all alone in a release they shall be taken most strongly against releasor but where there is a particular recital then gen. words shall not be qualified by the particular recital
3 Co 710 2 Ch R 122 1 Sw. R 255. 2 Roll 409 3 Ch. 277 S.C. 1 Cowen 126
Cartle. 118 S.C. 1 Show 150 1 S.R 113 9 Mod. 235 1 Salk Bank.
in none of the cases have the gen. words been rejected — for in the cases cited there was a particular duty &c recited on which the gen. words were left to operate
2 Ch R 125 by Gould J — 2 762.

A release by fraud of one party to a contract under seal by one only of the parties of the other part is good 14 Johns R 330.

An agreement on an adequate consideration to pay a certain sum cannot be discharged by an agreement to receive a less sum - 14 Johns 169.

Replication to a plea of release that it was obtained by fraud that it ought operate as to one of the defts only is bad for an instrument of this nature cannot be varied by parol & the agreement in this case was made after the release 23 C L 301

A covenant not to sue one of 4 joint obligors is not a release of the others where entered into with their consent & where they were agreed not to plead it in bar of the original action 4 Mend 607

A release of all demands to one of two joint or joint & several obligees is a release to both — 8 Ittg 376 1 Burr 232 a Mod 10 Sal 574 2 Ld R 125. contra as to joint & several 4 Mend 611 8 JR 168 — 6 Ch. 18

9

That a covt not to sue one of two joint & several obligors is a release to both. see 8 JR 169 mo. 1 Burr 232 Lill R 691 1 Mod 36 Ld R 690 Sal 574 Mod 10 2 Mod 855. L. contra 8 JR 171 12 Mod 551 11 25 11 Mod R 175 4 Mend 611 — 6 John. Ch.

If obligee covent. not to sue obligor for a certain time it is not a release / 2 Saund 48 a Croke 623 Cook 123 124 2 Sal 573 / Sam if it had been a part of the deed itself or under seal 8 JR 483 — Croke 623 13 R 446 & Do — 48 b 2 Saund 48 a 2 Sal 575 12 Mod 551

Release

release or collateral cont. 1 Saund 292 & 54

Release is made reserving rent - Lessor assigns over the reversion & then releases Lessee from all demands - this will not save him from an action by Assignee for rent - for he does not owe him rent by reason of any contract (ante 250) but by virtue of enjoyment & privity of estate. 8 Co 94. 1 Ser 99. Selw 548 & 157.2

A cont. of an inferior nature is discharged by one of a higher 6 Co 45 -

Rule - Contracts of the same nature do not discharge each other & M.R. says the last ought to discharge the former - Cro E 579 Cro E 85 1 Burr 9 1 Bar 23

Tho the principle of admitting parol proof to vary the operation of a written instrument are generally the same at Lawes & Eq. yet in one instance they are varient. Chancy. will admit such proof to relief in equity - & no perfect justice between the parties 2 Ves 299 6 Bro P.C. 580

Many things which do not appear on Releases may operate as such - & Cont. not to sue - Bac. Abt. Release

If one cont. not to sue one of two joint & several obligors yet he may sue the other. 8 Mod 168 2 Saund 48a

Full Payment

Full Payment is a good plea in bar of action on contract & nothing besides - It admits the original cause of action - & M. K. thinks may be given in evidence under the gen. issue of Non Cept. as well as Nil debet - for the words of the plea being in the past time is of no consequence - 3 Bro 146

By C. L. full payment could not be given in evidence under the gen. issue in an action on a bond nor could it be pleaded but now by St. it may be done in case of bonds with conditions only 2 241

A Bond or note will if unaccounted for be presumed paid after 18 or 19 years - no precise time fixed - 5 Esp. 65 2 - in n. 13 R 270 2 245

Decided in one case that if a creditor of a Bankrupt recover by foreign attachment a debt due to the Bankrupt in a foreign country the Assignees may recover it of such creditor as money Used & received to their use tho they could not have recovered it of such foreign creditor - dist. Ch. Justice 2 H. Bl.

A note is not an extinguishment or payment of a precedent debt unless there is an express agreement to accept it & to take the risk of the maker's solvency (5 John 68 2 Caines 117) Soon forged bank note - is no payment 2 Johns 455 4 John 146 n

Ind. Lept. for goods sold (£ 787) plea payment special manner because the plea amounts to gen. issue - but four Cur. it admits

& Cirbau in case of a surety. Jenning Lessee in case of in debt
ones 11 Mod 404 —

Payment by a third Person not a party to the suit is
a good defence 2 Ld Ra 251 and antea 247 — In a
plea of release by a third person Pl may reply no
release pers. 2 Bulst 55. 1 Ld Ra 553.
That the release of a stranger cannot be pleaded in bar vid 3 Paige
249 2 Co. 673 3 Lev 138 3 Mod & Sal. 308 5 Mod Ra 23

Where an account is kept of debt & credit unexplained the
first credit shall extinguish or be applied on the first charge
& so through the account - yet it may be shown that a
particular credit or payment was intended to apply on a
particular charge 15 Ld. 349 1 Marinda 572 Clayton case

If one refer a third person to his debtor for payment intending he
shall be paid presently in cash & such third person give debtor
or receive payment in any thing else & a loss ensue such
third person must bear it 14 Ld. LR 8 4 Burrs 257 6 Ba 6 1140

4 Esp 461 n
2d 449 n
P 5

Declar.n common counts - plea full payment dep.t pres. a payment for certain sum not all claimed - Pl.ff offers see proof he can recover only nominal damages - he should recover more than the sum specified 5 Term 290 Lee Lord Hill on to Ch E. 449. 450. 456 5 Term 394

When the cond.n is to pay on a particular day delivery must pay on or before the day but the plea must inform state the payment to have been on the day Cro E 142 But where the cond.n is to pay on or before a certain day the plea must state it to have been paid before the day & Pl.ff may reply that it was not paid at the day mentioned in the plea nor at any time before or after but must not claim 2 Saund 48 b 2 Burr 944 1 Mod 212 - Cro E 823 2 Sal 508

vid 3 Co 23 Cro E 255 Moor 692 that payment after the day cannot be pleaded without an equivalence by deed Seems now by 4 Ann. C. 16 § 12

A & B. Mines a farm & agreed to pay in a particular way Landlord afterwd - without the knowledge of B. took A's negotiable paper payable at a diff.t time - holden that B. could not be sued on those notes, or for the rent & that his subsequ.t occupation was not a ratification or assent to the act of A. 14 East 106 & such w.d have been the case had he given an accept.d bill for such rent in his own - & B's assent without B's consent

Lapse of time is not evidence of payment - it raises a presumption which supplies the place of evidence & is conclusive unless rebutted. 5 Mass. 296. cites 12 Johns 245 10 do 417 - 415 - 195 16 do 214 2 Cowen 330 - in case of Judgments as well as other specialties 16 Mass 425 5 Ct 1

15 Mass 24

Where there are several accounts between the parties & money is paid the debtor may direct its application if he does not the creditor may - if neither the Law applies it where most beneficial to the debtor 8 Mass 416 1 D & R 286 2 Atra 1194 14 East 239 244 n a Peake C 64 2 Esp 66 5 Taunt 574 16 L.R. 201. 56 4 Cranch 320 9 Wheat 737 3 Caines 14 6 Cran. 427 - creditor may apply at any time before the case comes to the Jury 29 6 L 25

A Bill of exchange will be a satisfaction of a precedent debt where the holder by any act makes it his own Ex. neglect to present it for payment when due - altering it in a material part - 23 6 L 156

Paymt of a less sum of money than Pltff's debt without a release is no satisfaction of Pltff's claim 1 Bra 426 2 Johns R 449 5 East 232 17 Johns 169 2 BR 24

But if when the parties of such an agreement to take less than the debt a third person is bound in to become surety for any part of the debt the agreement will be binding 5 East 235 11 do 390 - 6 Mass 253 20 Johns 790

In letter a maker & payee a note is not considered such a payment as will sustain an action for money paid &c. &c. give B. his note for a worthless article he cannot recover for money paid 1 Mass 430

The note of a third person the taken at the time of making the contract is no payment unless expressly agreed to be so rec'd in full satisfaction & payment - 1 Mass 385

7 BR. 66

1 Ct R. Butler in Alnator

9 Ct 30 the rule in N.Y. exploded & the rule in Mass repudiated

at one time a good cause of action (viz Sok 217) in Pltff but excuses it by matter ex post facto & therefore is a good plea Selw 146

Where there are several demands the party may at the time of payment apply the money to whichever debt he pleases - if he does not the receiver may apply it as he pleases 2 Cruds 55 Stra 1194 see 2 Dam 607 Selw 147

In pleading full payment Deft should plead satisfaction & not omnia non debet - for he allows the promise to be a good promise but avoids it by matter of discharge ex post facto - Sok 217. Selw 146 in n.

Accord & Satisfaction cannot be given in evidence under the plea of full payment 1 Roll 141

In case of bonds if there are two obligors a release to one is a release unto both. Esp 244 1 Lutw 294 - qu if the bond is joint & several

Under the plea of non assumpsit to a note full payment cannot be given in evidence (1 Roll 404) Sums of unliquidated promises

Where a party has taken a bill or note for a present debt he is not confined to his remedy on that but may resort to his original cause of action (3 Johns Cas 74) But in such case he must either show the note to have been lost or produce & cancel it at the trial 1 Johns R 34 8 149 10 - 366 / qu. in Ct. 162 N. 409 Ric. 291 1 Root 260. 271. 2 Ch / qu. in N.J. if the loan absolute and not by way of security 5 Johns Ch. R. 289 6 Ill 52 12 66

2 Day 27. 6 Mass 521

Infancy

Infancy is a good plea in bar of actions on contracts.

But in all cases where the infant after he has attained full age promises to pay the debt contracted during his infancy this is not a good plea.

An Infant may contract for necessaries & in all cases of this sort when there has been no subsequent promise if he plead his infancy the proper replication is necessaries. Stra 1101 Esp 161.

An Infant may bind himself in a bond without penalty for necessaries. 2 Str 1251. Pow. 31.2. 1 B.R. 41 Cro J 220 2 Bulst 69.

Necessaries as understood here are such articles as were actually necessary to the Infant according to the situation he was in when delivered. Ex. Victuals, clothes &c.

Gen. rule. If the Infant in these cases be placed under the guardianship of any person who is obliged to furnish him with these things he is not liable for them they are not necessaries delivered to him. Bl. R 1325 Esp. C 49

If an Infant buy a coat to preserve him from freezing he is not bound to the amount of his contract if the coat was not actually worth the money Esp. C 211

If the articles taken be actually of great value yet the

Note or contract entered into by an infant in a foreign country, plea of infancy to an action upon such contract here such plea must aver that by the law of such foreign country he was an infant & that by the law of the same country he was not liable and the law of such foreign country must be proved as a matter of fact. 8 Johns R 192. Thompson v Ketchum 3 Esp 163 Male v Roberts –

Suit is chargeable in tort for obtaining goods fraudulently, with an intent not to pay for them 5 Hill 392. 1 do 311. 317. 25 Wend 399. 15 Mass 359. 2 Pick 492.

Infancy

Infant is not bound any further than the value to him
Ep. He should be bound to pay no greater sum for a gold
laced coat than for a home made garment

An Infant is not bound by a bond actually given for neces-
aries - for the value of the articles does not appear in
the bond - or he is not bound any further than
the actual value to himself & nothing could be admitted
to prove the value

Infancy is no plea against torts of any kind.

The consideration of a bond may be gone into to prove it
fraudulent but not to deny the existence of any consideration
2 Wils 341

If an Infant be under arrest for a debt not necessary & money be
paid to procure his liberty, it is not recoverable of the Infant
Semble - if it had been for a necessary debt or Infant had been in
exec. 5 Esp. 628

A subsequent promise to bind an Infant must be when he is free
from any tenor & with a knowledge of his privilege
5 Esp. 105

If Deft to a plea of infancy reply a subsequent promise after 21 it is
suff. to prove the promise & it lies on Deft to shew he was
not of full age 1 Str 648.

Usury

Usury is a good defence in bar of actions on contracts

Usury operates in two ways - 1. To make void the contract in which it is retained - 2 To incur the penalties of the St - against Usury

1. If unlawful interest be reserved in any contract it makes the contract void - to which Usury may be pleaded in bar - but the mere reservation in a contract of unlawful interest unless actually taken will not incur the penalties of the St. Doug 235 Cro E 20 3 Leon 205 2. Sty 417

2. If the Unlawful interest is actually taken the penalty of the St is incurred & may be recovered by any person who will sue for it - Cutts v. Sup - 1 Saund 295 n 1

If the contract be a bona fide one & by a subsequent agreement usury is received or taken this will not avoid the original contract - Cro E 20 1 Mod 69 2 Ch 307 Ch 119 1 Saund 294 S. Ray 197 3 Mod 391 3 Mod 142 Burr 1077 Comp 112 1 H.Bl. 464 no 1 Bu 108.9.10 qu - a.

Nor is a bona fide debt destroyed by being mingled with an usurious contract relating to it. 1 H.Bl. 462 Yelit. 19 1 Ba 514 Stra. 1012 1 Bull 187 1 Saut 172 Cro E 930

If the contract on the face of it appears to be usurious a demurrer is the proper plea - but if the Usury is hidden by a bond

An usurious note given for a pre-existent valid debt being void the holder may recover the original debt 3 Burr 1081 4 do 2253. 2 Burrow C. 82 1 Saund 294 11 Mod 359 8 Cowen 77.40 But where A. gave his usurious note in discharge of the valid debt of B it was holden that no recovery could be had against A. for such original indebtedness of B 5 Maud & Sel 397

If money is lent at usurious interest a subsequent contract to pay the principal & legal interest is void 1 Camp 157 Cowen 1 Camp 115 n 3 Day 363

No debt to recover the penalties for usury the day of the usurious contract must be alleged & proved as laid 2 Wh & L 173 4 Esp 152 1 Saund 295 n

And the time for bringing the action for the penalty begins from the receipt of the usurious interest Day 235 3 Wils 281 1 Saund 295 n

Burr 2253
Doug .. 237
Cowp 114
3 BR 538

2. But if the usury so subsequently received is actually taken the Penalties of the Statute are incurred 1 Saund 294 & notes quoted

Stra . 498
1 Hawk P.C. 248

Whenever it is in the power of a known lenderer of money to pay the principal within a limited time without interest upon nonpayment the reservation of a larger sum than the law allows is no usury for usury is originally an agreement originally to pay the principal with more than legal interest Cro Car 115 6 Cons. 483. 5 Co 69 1 Hawk P.C. ch. 82 p 10. 8 Ally 259. 10 do 284 19 John 336 –

If a creditor agree to receive more than legal interest for the forbearance of an antecedent debt & such illegal interest is included in a new note given on the settlement of such debt such new note is void it being for a loan of money 1 Chip. N.R 111

Le similar is not allowed - to make it the interest of a loan that the should receive a compensation for his services in procuring the money 1 Johns ch. R. and tends to usury 6 Ves 270 2 BR 258 But the borrower ought to pay the actual expenses of writings. 1 Johns ch 7 –

Where principal is purchased at a certain price to be paid by instalments at a future day a note can give compounding the price & interest it is not usury 14 LL 81.

Every security given upon an usurious agreement is void in the hands of every one Doug 736 3 P. 1 Burrow 295 n more change of securities nothing 20 Johns 285

vid 3 Ray 191 1 Hare Pl 249 p 37 Burr 2251 Strac 635 that the borrower of the money is not a competent witness to prove the usurious contract until he had refunded the money - Contra now 7 Wr 60. 1 Burrow 295 n

A borrower who has paid usurious interest is not limited to his remedy on the Pl. but may bring a prompt for money had & received at C.L to recover the excess of interest so paid - but on this is an equitable action & off must show that he was paid or offered to pay the principal & legal interest. 20 Johns 290 1 Wr 153 - 1 Cowen Decision on Pl. C.

If usury is reserved in a contract it is void but if it be not stipulated for but only attempted taken the contract is not void but the party is liable to the penalty for the excess 9 Pet 399 2 Ch 527.538 Cowp 112

Taking interest in advance upon negotiable paper & payable at no distant day is not usurious for the benefit of trade 2 Lowen. 678 675. 712 15 Johns 162 2 Wh. R 792 1 Bos 144 2 J R 52. 8 Wheat 838 - Contra Ho J 25 Moo 644 Gold. 30 Nov 41 1 Bulst 20. vid 2 Lowen 767 -

In debt to recover the penalty the day of the usurious contract must be stated in the declaration & proved as laid not suff to prove that contract was made within such time or such terms as to render it usurious 29 C.L 173. Hamm 395 & n.1.

Counting interest upon the principle that 30 days is the 1/12 of a year 60 days the 6th 90 days the 4th of a year & 3 days the 10th of a month & discounting a note upon such calculation is usurious 2 Lowen 678 712 vid 5 Ct 567 —

The usurious interest being proved to have been taken it lies upon the lender to show that it was taken under such circumstances as not to render the transaction usurious – Q Mis 55 Cro J 507 Hob 374 Cro E 85 Poole C 202 4 Ves 678 Ord ~~Cas~~ 59b 4 B R 750 3 Dyer 345a Cro E 166 Ch. on B 608. Q –

A note is given including usurious interest – afterwards a payment is made upon it of a sum more than suff. to cover the usury received & a new note is taken for the balance due, last note held not usurious 10 Mis 124 Chadbourn v Watts 8 B R 390 Cutteleat v Haley 4 Esp 11 Turner v Melme cited –

If a loan bears interest from a day past day the contract shall be considered as of a date antecedent to its execution 1 Wash. R 8 2 Branch 10. Gow v Mastellar & Mand 534.

So he must expressly aver that the agreemt. was for giving day of Paym^t — Jones 410 1 Saund 295 B n 1

In a plea in bar the whole matter must be set forth truly & specially so as to meet the evidence for if there be a variance between the contract stated by the one proof it is fatal Cowp 671 3 BR. 538 / But in an inform^n the contract may be set forth generally 1 Hawk P C 248 §24. fo. 1 Saund 295 B n 1 for the information may be lost, by a stranger who is not presumed to know the facts

The plea of usury so far as regards bonded security is personal hence the assignee of an equity of redemption cannot avail himself of usury in the original contract of loan & mortgage 10 Wheat. 367 —

2 GR. 132

Usury.

or note the usury must be pleaded & may be proved by parol
id. 2. 35-b

It is necessary in pleading usury to allege a corrupt agreement & if the plea is orderly set forth Pltf must traverse if informal he must demur. C.W.C. 301

It is necessary in order to constitute usury that there be a corrupt agreement. hence the reservation of exorbitant interest by a mistake is not usury & such mistake may be proved. Ord The form is not till usury is actually received 2 Str 239 Cage Doug 223 There must be an express contract & an express taking to constitute usury 2 Str 1111 1 Saund 195 n.

Receiving a discount for paying money before it is due of more than 6 per cent is not usury. 5 Esp 11. 2 Str 52. 3. 2 Burr 94 Hob. 236 1 Str 393

So a fair purchase of a note at a fair discount is not usury 1 Call. 27. 2 92.

An agreement to pay compound interest is not usurious the such agreement is not binding & obligor is not compellable to pay more than legal interest.

If a surety to a usurious bond pay the whole money he can recover it of the principal 1 M.&S. 139
yes. Can the surety recover it of of Payee? Peake 215

Before a party can entitle himself by a civil action to relief from an usurious contract he must tender all the money really advanced 1 Str 114 1 "learn bond" 1 Holt 38 Vin 315

Foreign Attachment

If money has been paid on a Foreign Attachment it is a good plea against an action by the absconding debtor

If Garnishee is debtor to the absconding debtor by an exp. only which is in the Sheriffs hands & judgt. is obtained against him on the Sci-fa - he may pay the money to the Sheriff & the Sci-fa will have no effect on him - But if Sheriff has notice of the Foreign Attachment he must not pay the money over to the absconding debtor - for it is attached in his hands for the use of the Pff. in the Sci-fa -

If the Garnishee was not attorney-factor-agent or trustee to the absconding debtor & Pff wishes to bring another action against the absconding debtor he must resort to his original cause of action - for if Garnishee was not agent & the first suit was not legally served & he had no legal notice - so if the service was bad the judgt. must be void & might be avoided by Audita Querela & no action will lie on it

Mr R - supposes the Garnishee cannot defend in the suit against the absconding debtor tho it has been held otherwise

The payment of money in a Foreign Attachment may be given in evidence - so may the Attachment only be pleaded in abatement -

Foreign Attachment

No. 2 25

A Judgt. debtor cannot be made a Garnishee nor can such debt be attached. Lee & bs. Young 3 bs.

A garnishee may give in evidence upon the fieri fac what the absconding debtor had said to disprove his owing him (1 Root 138)

Pff may introduce other evidence besides the garnishee to prove his indebtedness 1 Root 138

An issue joined by the parties upon a fieri fac against a garnishee may be tried by the jury 1 Root 138

The garnishee must be personally in Court to testify upon a fieri fac if required by Pff. 1 Root 140

A Garnishee may be examined of suspecting a mistake in the note taking of him (1 R. at 198.)

Pff may recover of garnishee the balance of a debt due from him to the absconding debtor by assignment from other

Composition of Creditors

A composition of creditors is an agreement to take less than what is due in consideration of an insufficiency of property to satisfy all the debts. 11 East 390.

It may be pleaded in bar to an action by any creditor for his whole debt

It differs from Recd & Satisfaction inasmuch as it is good the operation & a tender of performance operates as a performance which is not the case in Recd & Satisfaction. see contra 2 BR 291

If there be a private agreement to give one creditor more than his proportion it is void as a fraud on the whole or other creditors & money paid in pursuance of such agreement may be recovered back by action - Security to pay all the creditors their full debts. 1 BR 134. 3d 24. 5 Bl. 70

An agreement between a debtor & his creditors to be a composition for their debts cannot be given in evidence to an action brought by one of the creditors for his whole demand 2 R 278. for it is a mere bargain - Security the debtor has assigned over his effects to trustees for payment of 17 R 28 - or they be have accepted &c - 1 R 182 Agreement must be under seal or it will 4 Paige 308 2 Johns R 445

A bankrupt cannot compound his debts without consent of all his creditors. Ash. 1. 3 R 24

Where several creditors signed an agreement with the consent of the debtor to accept payment in a different manner than stipulated by the original contract & the debtor having been always willing to perform on his part held that the deed was neither an accord & satisfaction or a release yet it might be pleaded in bar to a suit on the original indebtedness the consideration for each creditor signing being the performance of the other 22 Co L Rep 1.

D Accord B 4

In 20 John 487 the goods of A. were taken by ex^n as B. all the Court held that it might sustain Replevin. Plaintiff Lev. said that Replevin lies in favor of any person where goods are taken by a trespasser. Cites 7 John R 140. 6 Cowen Replev^n A. 1 Sels. & Sof. 524 that there must be an unlawful taking found from the Poss^n of Pltff to maintain Replev^n 14 John 84 3 Wend 380 1 Cow 112.

Will not replevin lie in favor of the ex^n debtor for taking property exempt^d from ex^n? as a gen^l rule it will not lie in favor of ex^n debtor 15 John 401 14 Cow 84

In Mos Replevin lies as well for the unlawful detainer as for the unlawful taking of goods 5 Mos 284 18 Cow 359 16 Cow 147 Bac Trespass C. 2

Replevin

In Eng. Replevin is a redelivery to the owner by legal pledge of cattle or goods distrained (4 Bac 372 Esp 346 1 Inst. 145) for any cause on security given to try the right & to redeliver if judgt. be against him – Distress is the taking of a personal chattel out of the possn. of the wrong doer into the custody of the party injured to procure satisfactn. for the wrong committed – it is the act of the party injured (3 Bla C.) Sometimes signifies the thing taken by distress –

Replevin lies not for goods taken by a mere trespasser out land – 2 Leo 93 Bull 53 3 Bl 146 qu Bull 52 – contra 7 John R 140

but it not granted but upon security given by plff. to try the right of distress &c in Eng. & to redeliver the property if judgt. is for distrainor. 3 Bl. 13, 147 1 Inst 145 8 Co 127.

In Eng. plff in Replevin does not try the right – i.e. pursue the action – or fails in it the property is to be returned to distrainor who may have a writ de retorno habendo (1 Inst 145 4 Bac 382 2.) It being returned to distrainor he may keep it till tender of suffn. amends & no longer 3 Bl 147.58 8 Co 127 vide Esp 377

Tender of suffn. amends before distress makes the distress tortious – if before impounding it makes the impounding or detaining tortious – not the taking (8 Co 127 Bull 60) If after judgt. for distrainor it makes the further detainer unlawful (Esp 355) 2 Sia 40 5 Co 76 2 Roll 561) & in the last case

Replevin

Pl. may have Detinue or (Trover) Trover. 8 Co 117

When a distress is taken it is to be impounded - inanimate chattels in a pound overt - animals generally in a pound overt - No pound overt here. 3 Bl 12 1 Saut 47.

In Ct. the security is a substitute for the property replevied - it obligates the bondsman to respond in damages merely & the property is not redelivered to distrainor on any event. Ft. Ct 360

Formerly in Eng. a distress being in the nature of a pledge could not be sold - distrainor could only keep it as a punishment to the owner if he was stubborn - (3 Bl 10.13 Burr 588) Sts. have in a great measure remedied this inconvenience especially in case of distress for rent by allowing a sale in certain cases - but not in case of cattle taken damage feasant (3 Bl 10.13) & in some other cases - There were always some exceptions to the old rule - 3 Bl. 14 8 Co 41 12 Mod 330 -

Writ of Replevin is demandable of common right & even the rent is granted purity right of distress in replevisable 1 Bac 3 1 Saut 145 -

The principal cases in which distress may be taken by the Eng law are two - 1. Case of cattle damage feasant - 2. Non payment of rent & the 2 not in evidence 2 Sir 89 / 3 Bl 6.) 1 Saut 245 Co 3 b 4) & in Eng Replevin may be at C.S. by writ out of Chancery or under the St. Marl. by felement (2.)

The action of Reptonia is local because the plane is material transverse 5 Mend. 290 inter 1 Sound 347 ul 1 Ch. 161 2 do 364 n.c 4 Cocow 45.6

Goods taken tortiously or by a trespasser may be replevied 7 Johns 1113 Geo E 824

346 - i.e. - Sheriff on precept on complaint made - So Sheriff may order his bailiff by word to replevy - Esp 347 F.N.B 159.

In Eng. writ of Replevin lies in all cases, (sub) in which distress is taken except when the distress is founded on a Capias in Utlagatum - i.e. - a distress by the order of the original distress - the latter being carried out of the County or concealed - in which case the Sheriff returns that the goods are elongated (i.e. carried to a distance) to a place unknown - St obtain when the original distrainor having retained the goods against the writ of Replevin on a claim that they are his own which claim is decided against him - & he conceals them - ut sup. - So if there is no such claim & the property is concealed &c - here there can be no Replevin (3 B 149 F.N.B 69 S.Ray 475) of the second distress till the first is forthcoming - When a writ de retorno &c is awarded & the distress cannot be found Sci fa lies against the pledges in the writ of Replevin. 1 Bac 382 F.N.B 172 Esp 347 Cro.E 322 vide Esp 376 2 Ibid, 44

In Ct. writ of Replevin lies in all cases in which cattle goods &c - are impounded distrained attached or seized except on exn. - for fines or rates or for some cause triable before the maritime Courts - St. Ct. 360 Perhaps all the cases not excepted in the St. will be those only of property taken under our writ of attachment & of cattle damage feasant - 2 Sw. 89

1. Cattle distrained damage feasant

In this case the owner of the land has his election to bring

trespass or to distrain & impound the cattle - But if he distrains & the distress escapes his action of trespass is gone unless the escape was without his fault (2 Saugs) & same rule in case the cattle die - 5 Ba 179 12 Mod 658. 63 B.R. 7 20 Sch 248

At C.L. the writ must have issued out of Chancery - the goods were then long detained from the owner - By 52 H 3. the Sheriff is enabled to replevy immediately 4 Ba 373 3 Bl. 149 S.N.B 68 13 Co 31

Analogy between taking the body of a debtor & impounding cattle - both pledges (4 Ba 354) damage not satisfied by death nor by escape unless the party imprisoning is in fault. In both cases the pledge being holden, no other remedy. 5 Ba 179 12 Mod 63 - 264

In Ct. where cattle taken damage feasant are impounded the owner not only may have Replevy but after notice he must replevy or redeem them within 24 hours or incur a forfeiture of 17 cents perhead for every days neglect besides paying the expense of keeping - & these forfeitures are to be applied for payment of the damages done & poundage then the overplus to be divided equally between the town treasurer & pound keeper (R 315) to be determined by an assistant or Justice who is to issue exn therefor.

In Eng - owner of cattle distrained must provide for them unless they are put into a pound covert - then distrainor must do it - (5 Bl. 13 1 Burl 47). If the owner replevy in this case & judgt. is given for defdt. in Replevy he will recover in the action for damage done (2 Saugs or 2 Sch.) & have exn - If exn is not

Where cattle distrain: damage feasant are put into a suff.t pound & escape without default or neglect of distrainer he may sue trespass for the damage sustain. they escaped also without default of the owner 23 C. L. 162 11 Mod 21 Ba. trespass F. 1.

236 L. 164 For where the body is taken in ex.n it is a satisfact.n of the debt 1 Bowen 57 Stra 653 Mod 82 in Ant 79.

Pltff. distrain'd. deft. cattle damage feasant & went to inform deft. during his absence the cattle escaped for half an hour into deft. ground from which place Pltff took them on his return - deft. retook them from Pltff. held no rescue 1 Co 47 for if cattle distrain'd damage feasant escape or after view go out of the fee they cannot be retaken Dam in case of distress feasant Co Litt 161 a 3 Esp 95 5 Bing 10 Pickt 257 -

a But after notice the owner is liable for subseq. damage 2 Saund 3. 2 Sutw. 1578 2 Saund 288 Ann 4 Com Dig Pl (M.29) 3 Sev 260 2 Vent. 341 Dy 319

discharged by Pff. in Replev. his bondsman is liable & this tho Pff's body is taken in ex. & he dies in prison or is discharged

Even writ of Repln. for cattle taken damage feasant contains in form an action of trespass - generally however Pff. in Replev. does not expect to recover damages but appears for the purpose of having Defts. damage assessed - If however the cattle were unjustly taken Pff. in Replev. recovers his damages - — The Pound keeper has a lien on the cattle impounded for his fees in case of settlement between the parties - qu as to this right against a Replev. -

In Ct. if the owner of cattle taken damage feasant is not known a constable is to be informed who is to post them in three & the two next towns & if the owner does not appear in days so many are to be sold as to pay the damage &c & in the mean time impounder supports them (St. 345.) Such estrays are also to be sold under certain restrictions tho not damage feasant -

Generally when cattle enter thro the insufficiency of the fence of the owner of the land no damages are recoverable. hence if they push thro the good part of a fence partly good & partly bad. damages are recoverable & they may be impounded - So if the cattle are unruly (St. 193) So if they enter from highway at B.S. immaterial whether the fence is good or bad (2 H. Bl. 527) for it is unlawful to permit them to go at large in the highway

But in Ct. black cattle & sheep are by usage commonable

Replevin

2 Ins they enter fences from highways yet if the fence is insufft. no damages – Qlitr if horses & swine enter from highways – to them the C.S. applies (St. 193 34 b 408) Vide St. 408. 444 enables towns to make any cattle commonable – & then no difference between entering from highways & from adjoining fields – qu –

For mischief done by animals from a disposition common to the species the owner is liable without notice or knowledge – 2 Bear biting &c – but for that committed from a disposition not common owned is not liable without scienne – 2 Dog biting &c (Cy 25.9. E.p 505 L.R 505) the scienne is not traversable by fela but must appear true or false by the evidence. 1 Roll 4 – 4 Co 18 Cro.E 350

If the owner of land chases least damage feasant on to the land of the owner of the beast he is not liable for chasing – If a stranger chases he is liable to both. Sed 120 5 Ba 119.

Distrainor not allowed to use a beast distrained – 3 Bl. 13 Cro J. 148) he becomes a trespasser ab initio –

When there is a trial in Replevin Deft. may either deny the taking or show his right to take – i.e. in case of beasts damage feasant. 4 Ba 388

Gen. Issue "Non Cepit" (1 Vent 219 4 Ba 388 Bull 54) Upon this issue claim of property cannot be given in evidence – in Eng it should be pleaded. Bull 54 Sal. 5. 2 Lev. 92 6 Mod 81

If property distrained is rescued distrainer may retake them on fresh pursuit which must be owned in the place but not in such manner as to occasion strife & bodily contention or endanger the peace of society 20 C L 279 3 B 5.

If the goods taken a felon where are not sufficiently described in the declaration it is error for special demurrer & it cured by Plaintiff over 2 Saunders 74 a b. 24 C & D 245

Replevin

If Deft. justifies because the beasts were damage feasant he is called the avowant (Esp. 360 3 Bl. 150 2 Saund 195) Where he justifies in his own right or that of his wife - If he justifies in another's right as servant &c he is said to make cognizance 3 Bl 150 -

Avowry is in nature also of a plea to the Replev.n - the replication in the nature of a plea to the avowry - in this case both parties are Plffs - the owner suing for damages & the Avowant in Ing.t for a return of cattle & in some cases for damages, 4 Ba 373 2 Ath 149 Cro E 798 Bull. 81

In Ex. both claim damages only the cattle here not being returned

That Avowry is in nature of an action appears from Avowants right to recover damages & ing.t for return of cattle &c. & in some cases damages (4 Ba 373 Esp 376 2 Dis 117 Sal 95 2)
2 Plff may plead in abatement of the Avowry (4 Ba 373)
2 Avowant need not close with a verification (Cro E 530 798 Bentle 122 4 Ba 373 Pleaw 263 Ath 103 Yelv. 148 -

Tho the Avowry is in the nature of an action one tenant in Com.n may it is said Avow without his companion (Cro E 530 4 Ba 373 Esp 374) for taking cattle & damage feasant - overruled - he must make cognizance as bailiff of the other. Wms Saun. 253 2 H Bl. 386 1 Roll 230 -

Replevin

Tenants in Comm. may have several avowries for rent for it is in the realty - 2 H.B. 387 Arg. Coutts 310 Bel 389. T.R. 122.

A title to land may come in questn. in this action - in which case it has been called a real action - now holden to be personal - for land cannot be recovered in it. 4 Co 373. Finch L. 316 Cowl 476

In Ct. a writ of Replevin in case of cattle damage feasant is returned to a Justice & if the damage exceed his jurisdictn. he must (Sends) dismiss the suit - Under St. Ct 346 if beasts taken damage feasant & impounded escape the damage & poundage are recoverable by Debt - impounder making oath that he took them damage feasant -

Rule - Till distress must be taken by day except in case of beasts damage feasant lest they should escape - 3 B/11 Esp 360 1 Smit 142. 61.

Distress for damage feasant must be made while the beasts are on the land (Esp 360 1 Smit 142 Q Co 22) formerly so with respect to distrs for rent except it might be taken on fresh suit - now remedied by St. 3 B/11

Formerly the landlord might take as large distrs as he pleased for rent - tenant had no remedy tho he now has by 52 H.3 - a special action on the case (3 B/12 3 Leon 8 Ward 104 Stra. 851) Trespass not maintainable

If one distrain damage feasant & whilst driving to pound they go into the house of the owner who withholds with them this is a rescue 16 Ellf 655 Barnes of the Law tit. Rescue -

If a joint distress be made under several warrants for several rates of which one is bad the distress is not therefore void but a justification may be made under the good warrants & the bad one be abandoned 28 C. L 80.

(Burn 590) in this case it being no injury at C.L. except where gold or silver being of a certain known value were distrained (Burn 590) in other cases a special action on the case founded on the St. is the proper remedy.

Distress for rent is incident of common right by C.L to those cases only in which the owner has of the rent has the reversion - not where he has no future interest - As in case of rent charge where the owner of the land conveys his whole interest reserving a rent (Litt § 218.15 1 Burr 142 Esp 355 2 Bl. 42 -), but he may have the right by clause of distress at C.L, then now the right of distraining is by St. 4 Geo. 2 extended to all rents. 2 Bl. 43 3rd b Esp 355 -

In case of distress for rent by 17 Car 2 - if Deft. in the action of Replevin prevail he recovers his costs & so much in damages as is equal to the value of the distress if that is less than the rent due - but if it equal to or more than the rent due he recovers in damage the amount of the rent & in first instance distrainor may have a further distress - 3 Bl. 150 Bull. 58 3 B.R. 349 2 H Bl. 36. via - Esp 377 2 Ld. 116 -

2 Personal property attached

Replevin in this case is never an adversary suit - no hearing on the Replevin writ - but on the attachment (2 Sw. 93 Riley 24) called a "mandatory precept" requiring the offender to redeliver

In an action agt. a Sheriff for taking insufft. sureties in Replevin the assignee of the bond cannot recover as special damage beyond the penalty of the bond the expense of a fresh action against the plaintiff unless he give the Sheriff notice of his intention to sue thereon 11 C L 27 & such is the rule between creditor & surety generally surety is liable to the same amount as his principal would be. 39 C.L. 314 vide 4 T R 433 2 H. Bl 36 3 Stark N.P.C. 168

the goods &c - Rule 276 -

By this writ property is restored to the owner on his finding security to prosecute & to answer all such damages demands & claims as the adverse party shall recover (St 360) The security to prosecute the Replevin is in this case mere matter of form

This writ is founded in good policy - that the owner need not be dispossessed of his property a longtime - & as attaching is but for security he suffers no injury security suff. - The object being to regain the property the practice is to charge no wrongs or demand damages - no pretense that the taking is illegal - Decidedly & that a Replevin of goods attached should be directed to the officer who attached them requiring him to re-deliver (ut supra) - to give notice to Pff in attachment & to return the writ Rule 276 -

Replevin returned to the Court (Rule 276) to which the original action is - The bond is the pledge to secure the original Pff. & is presented in Court on file for his benefit - Bond taken (as all bonds to prevente now use) to the adverse party Deft. in Replevin 2 Ind. 93 St. 28

Replevin in some measure superseded by receipting - Magistrate taking the bond acts ministerially - he is liable if the bond is insuff. (Semble if the bondsman

is responsible at the time) & the action may be brot against him tho no previous suit has been brot against the pledges Bull 60 -

He leaves merely in this case for the whole debt (Semb.) as in Eng. the Sheriff does - even over the amount of the bond taken as the case may be (vid 8 J.R 28 1 H.Bl 76 Cowp 71) (2 H.Bl. 547 contra) 2 H.Bl 36 case in H.Bl stronger than a similar case here - bond in Eng being for return of goods (Esp 348 Cowp 336 & N.R 433) (2 H.Bl. 546 con) the action is case Bull 60

Formerly doubted in Eng whether the action would lie - Bond in Eng double value the goods Bull 60 2 H.Bl 36

Been a question in Ct. whether Pff bond might be taken by the Magistrate - Decided in C.L. that it cannot - at least Magistrate is liable on Pffs failure tho responsible when the bond was taken (Root 165) Suppose Pff does not feed is Justice liable in the first instance? Pl Ct. 25

Been questioned whether where property to a small amount is attached & replevied the bondsman is liable for more than the amount or value of the property - No decision Mr. B's opinion arise from the words of the St. (analogy to the case of a receiptsman who is always liable for the whole unless he deliver the property - Decided contra) vid 4 J.R 433 2 H.Bl 547 Esp 348 = (2 H.Bl 36 contra -

In Replev. Dft. may plead non cepit & also property in himself or in a stranger 11 Johns 194 cid 166 541 2 Bl 237.

And in Replevin the gen. plea of "de injuria" is proper 23 E. L. 456 2 Saund 594

Repeated in a stranger & a good place either in bar or adjournment
1 Hand 344 1 Johns 384 Bac 475 1 Sch 5

Can a receipt for goods taken in an action of replevin!
maintain Replevin against a stranger? I think it may
perhaps I think he may. 1 Hand 344 incorrect

Replevin

Questioned also whether Bondsman can discharge by rendering the goods after judgt. for Deft. in Replevin? This depends in some measure upon the former (i.e. so far as it is affected by his liability) how far he is liable. Not like the case of a receiptsman - he is bound only to deliver - Not like a bondsman in Engd. in Replevin who engages only for the return of the property - I apprehend that in Ct. he cannot

If the property of one is attached for debt &c. of another, Replevin does not lie, but Trespass does - for the Replevin in this case is not an adversary & no one can replevy unless he is party to the suit & has property in the goods. Kirby 276 2 Sw. 93 -

So it seems Replevin is not the proper remedy for a mere trespassing out according to the Eng. law it being "grounded" on a distress. Bull 53 1 Saut 145 Esp. 346 3 Bl. 13. 146 2 Saut. 89 qd. Bull. 52 L 278 -

If cattle of a feme sole are distrained & she marries, her husband alone may replevy - for property becomes his by intermarriage (Esp. 375 1 Bia. 81.2 Bull. 53) tho if wife join it is good after verdict - for the presumption will be that they were tenants - So Exr. may replevy a distress taken from testator. Esp. 375 1 Bid 81. Bull. 53 -

Replevin

If goods of several are distrained they cannot join in Replevin the injuries being several. 1 Saut 145 Esp 374 Bull 53 –

Goods distrained in a foreign country tho' not here cannot be replevied (Esp 372 2 Show 91) for the caption might be lawful there –

Replevin lies for personal things only – not of deeds of land Esp 372 4 Bac 385 F.N.B 68) Replevin is founded on the right i.e. Sam. on property in Pff. – hence a good plea in bar or alternative that the property is in a stranger (Esp 351.2 – 4 Bac 373 2 Sev 92 Carth 74 243 Sal 94) Diff. from action of Trespass (1 Bull 53) where Pffs "property" is suffn. – for in Replevin Deft. is in possn. till dispossessed by the Replevin itself

For the form & consent of Replevin see St. Ct.

Plea to an avowry for rent that Deft pulled down a dwelling house whereby Pff was deprived of the rent should be for it is a mere trespassing act – should have stated our action Bonf 243 – L 272

Bailment

Bailment is defined to be a delivery of goods upon a contract express or implied that they shall be restored to bailor or disposed of according to his direction when the purpose for which they were delivered is answered. & to be answerable with 1/3 to be kept. This is a bailment & there is an express or implied contract that they shall be restored to be or disposed of as he directs. 2 Bl 451 Jones 3. 48 Croke 632 Dean 258 12 Mod 482

Every bailment vests a qualified property in the bailee. For the time of the bailment a distinction was made between a pawnee & other bailees, allowing the former & not the latter a qualified property in the thing bailed - but all bailees have a special property tho the pawnee has a stronger interest. Sent the distinction false. Jones 112 Lyle 172 Dr. S. 129 7 Bl 398 1 Ba 240 4 Ec 38 1 Bnd 89 3 Lith 46

A mere bailment of goods gives the possessor a special property in them for a bailment of goods implies a rightful order & this poss. is an interest hence a bailee of goods has a special property in them & may maintain an action for them against any person for taking them away. 7 Bl 392. 397 Star 505 Jones 11 1 Ba 240 Sh 198

A bailee must keep the thing bailed according to the terms of the bailment & is liable for loss or damage generally - The bailee is not liable for any injury which occurs to the thing bailed without his fault - unjust to render him liable at all events. Jones 8. 1 Ba 236 -

To determine when the bailee is in fault the nature of the bailment & quality of the thing bailed as well as bailee's conduct are to be considered - for diff. things require diff. degrees of care - Jewels require more care from the depository than a load of grindstones. To ascertain the requisite degree of diligence some gen. rules must be observed. 1st. The bailee is required to have - 1st as the case may be to treat

Bailments

goods with a degree of care proportionate to the nature of the thing bailed. for some things require greater & some less than ordinary care - which ordinary care is defined to be "that care which prudent men in their own concerns & the Jury usually determine whether ordinary care has been used & what is ordinary care is a question of law but the Jury are to determine whether it has been used in the particular case. Jones 8. C 10 11 18 31

The degrees of care are three - Bailments - More than ordinary & less than ordinary - This ordinary is the standard but the degrees on each side are not distinguished by appropriate denominations - Jones 11 13 31

To every degree of care on one side there are corresponding degrees of neglect or default on the other - The omission of ordinary care is called ordinary neglect - in the civil law Levis culpa i.e. of extraordinary care or that care which every vigilant person takes is called slight neglect / Lipina culpa / omission of less than ordinary care or that care taken by thoughtless & inattentive persons of their own concerns is called gross neglect - / Dolo culpa / Gross neglect is generally regarded as amounting to fraud but this presumption may be rebutted as if bailee has taken the same care of his own goods as of those bailed. 2 K. C 15 Jones 13 30 55. 64 -

Gen. Rules - If the bailment is for bailee's benefit only nothing more is required of bailee than good faith - He is only to be subjected for gross negligence - where keeping is merely gratuitous on the part of the bailee a small degree of care is required - tho if bailee extends his liability by special contract he may bind himself to use any degree of care & to any extent or at all events - & when I speak of the care required it is presumed in those cases where no express agreement is made - or in cases where the law implies degrees of care. Jones 101-13 21 32 51 64 2 K C 10. 9 15 1 Bac 47 -

4 J.R. 581
Pacheco 114
4 Esp. 262

2 Kent 458
17 Mass 479.

Bailments

2. When the bailee only is benefited by the bailment, he is bound to use extraordinary care & is liable for slight negligence – Jones, 14 22 32 101.5 189 191

3. When the bailment is advantageous to both parties the obligations are to each bailor in equilibrium – bailee is bound to use ordinary care only & is liable for no more than ordinary neglect – these distinctions are derived from the Roman Law – Jones, 14 32 105 1 Esp. 315

Different kinds of Bailment

Bailments according to the C.L are divided into 6 kinds – This is not the division followed by Jones, 40 nor is it the most logical – But I shall follow the C.L division –

Depositum

Contractum or deposit is a delivery of goods to bailee to be kept gratuitously for bailors benefit – The bailee is sometimes called a depositary & sometimes a naked bailee & is liable only for gross neglect or violation of good faith – 12 Mod 487 1 Pow C 247 Dr. H. 129 B K 909.913 Hen 1099 381 1 H Bl 158 Bull 72 2 Bl 452 1 Ba 243 Esp 618 Com R 134

It is said in some of the books that bailee is excused when he uses "ordinary" care by which it would seem that he would be liable if he did not use ordinary care – This however is not true – the word "ordinary" appears to be used without an intelligent meaning. Dr. Holt in Coggs vs Bernard 1 Pow C 24 & 2 Ld R 909

The bailee is not liable in all cases for losses occasioned by gross neglect He is not strictly liable in any case for neglect or such lost for fraud only & he is liable for gross neglect only it is merely prima facie evidence of fraud – If there are cases where this evidence can be rebutted the bailee is not liable – As if depositary keeps the goods as he keeps his own of the same kind the presumption is rebutted – B K 914.15.16 Hen 1099 Dun 2 310 1 Pow C 247

Depositum. Bailment

But the authorities do not apply when the depositary assumes a higher responsibility by express agreement, for he may bind himself to any extent Cutter 275 1 Ld Ray 335 Gill 3 Keen K.B. 243 304 Jones 86.

The gen. rule that he is liable only for gross neglect applies only where there is a gen. acceptance viz. an acceptance by bailee without any agreement as to his liability — when there is such a gen. acceptance the law provides the degree of care that is necessary to be taken & the bailee impliedly engages to use this degree of care. Some make another exception where the officiousness of the bailee in offering to keep prevents their being entitled with a better reason — he cites no authority — qu. — & the other opinion one cet varaine with the gen. rules 1 Inst 89 4 Co 83 Cro E 85 Sh 95b

In Southcote's case there was a delivery of goods to be kept safely — The decision in this case appears to be correct but the reasoning throughout the whole of it appears to be wrong — There was an agreement to keep the goods safely & on account of this special acceptance the decision was right — The doctrine advanced in that a gen. acceptance obliges the depositary to keep the goods safely at his peril & if they are stolen he is liable that "to keep" & "keep safely" is the same. 4 Co 83.85 Cro E 815 4 Inst 89.

This is manifestly wrong — for it would subject bailees for even slight than ordinary neglect — There was in this case an action of Detinue — Deft. pleaded that the goods were stolen — to this there was a demurrer & the plea was in bar adjudged insufficient — The Judge was wrong on two grounds 1 On the same one that the plea was not good & 2. that Deft. agreed to keep the goods safely — Deft. should have pleaded that they were stolen without any neglect of his — This doctrine is now exploded by all modern decisions — 2 Bla 2 36 41 1 Burr 224 1 Bonn 103 Pla 141 1 Roll 338

Defd received money in deposit which he placed with his own & the whole was stolen. Held that the loss of his own did not necessarily prove reasonable care & whether there was gross negligence was a question for the Jury 29 E L 80

Depositum. Bailment

Palm 549 / post D. & H. 555 911 Sha 1099 Com Dig 133 Bull 72 -

It matters not whether the special agreement is founded on a valuable consideration or not / Being formerly / If indeed there was a valuable consideration it would not be a depositum - The mere delivery of the goods is a suffn. consideration to raise an implied promise & if bailees were liable only when the agreement was founded on valuable consideration he would never be liable for a mere contract without consideration Bac 241 Dr. S. 129 12 Mod 489 3 Keeb 245 394

I find in Southcote's case that if goods are left with the depositary in a locked chest if the bailee takes the key the bailee is only bailee for the chest & not for the contents - for he is not bailee of the contents but of the chest only - This however is overruled by L. Holt for he says that the bailee has as little power over the goods as to any benefit he may derive from them when out of the chest as when in it & that he has as much power to defend them when in the chest as when not of it & that therefore he is liable for the goods / 4 Co 83 Bull 93 1 Br. 237 3 Lev 47 / 8 D. & H. 914

In both cases the ignorance of bailee whether the goods were in the chest or not at the time which seems to be the time intention was not taken into consideration - If he does know he takes upon himself the bailment accidentally - said D. & H. 914 / that he is liable for the goods stolen - qu. unless he knew the goods were in the chest - for if he did he would be more careful than if he were ignorant - Sed he would not be liable if he was ignorant unless he had been guilty of gross negligence - nor for the goods even then - for it is fair to presume that had he known the goods were there he would have taken better care of them - If the bailee is liable it is on an express

Depositum. Bailment

or implied contract – there is no express one & the law will not imply a contract on his part to keep goods of which he is ignorant he has profit & certainly not to the bailor for he has been guilty of fraud or laches to bailee – Bailee is an insurer to a greater or less degree according to the circumstances of the case & on the laws of insurance the insurer is discharged if there is the least suppression of information in the case respecting the thing insured – & why not the depositary? It is the bailor's duty to inform the bailee that there are goods in the chest – for if he did not & bailee was found it would be a gross fraud upon him. 7 Mod 705 1 Co 83 Jones 143 –

A special agreement by depositary to keep the goods safely does not subject him at all events even if reduced to writing – for he is not bound in case of robbery & inevitable accident – If he is liable for theft – for ordinary care might have prevented it / if there has been no neglect in him & the goods have not been exposed – he is liable for theft for the case will not supply strength yet it will rigilance – 2 Mod 913 Jones 62 75 Dr. & 130 1 Roll R 248 Mod 34 4 Co 83 pot.

If the depositary detain goods after demand is made or otherwise consents thereto his owner the bailor may maintain detinue for the unlawful detainer – trover for a conversion – or replevin for a breach of promise – he has his election – Bull 72 Co 2 781 1 Roll 128 1 Com 220

Jones says that if the depositary is at expence in keeping the goods he may mention to recover him self – no authorities but the rule appears reasonable

Suppose the deposit distrained by the landlord of depositary for rent – he would be liable on the ground of gross neglect & fraud if he removed his own goods – If he were honest could bailor recover –

Bailment

in 2nd. Cpt. Pot. { A mere wrongdoer bailee is not liable to an action at the suit of bailor for goods bailed until after demand & refusal. 9 John R 361 }

Commodatum

This is a gratuitous loan of goods to be used by bailee & to be specifically returned. Jones 50 89 D. 12. 913 -

This bailment is entirely for bailee's advantage hence he is bound to use more than ordinary care & is liable for slight neglect. Ex. A borrows a horse of which is stolen from the stable the door being unlocked - B is liable - Jones if he had locked the door & Gth. rule that the loss must fall on the bailee is called in this case & the bailor the bailee is liable in case of theft unless he proves extraordinary care on his part. Jones 51 92 1 If bailee entrusts the thing borrowed to a person of approved fidelity to be carried to the bailor from whom notwithstanding great care it is stolen the bailee is not liable. Bull 72 1 Ba 244 Pow & 249 Jones 92 D. 12 4 13. 915 Jones 50 89

The proper Eng. name for this kind of bailment is "loan for use" - It is necessary to distinguish between a commodatum & mutuum which last is a gratuitous loan & refer - agrees with the former but differs in this that a mutuum is where a specific thing is loaned for consumption & not to be returned but some thing of the same kind - Ex. Money, wheat to be returned in the exact amount this is not a commodatum but a mutuum - In case of a mutuum the property immediately becomes the borrower's who must bear the loss of it - In case of a mutuum there is no bailor & no bailment & the rules of law laid down for a commodatum have no relation to a mutuum 2 D. 2 129 1 Ba 241 Jones 89

The borrower is not liable for maintenance ordinary or otherwise if the loss be occasioned by time & without his fault - Jones if he is negligent Ex. Leaving the goods where loss will probably occur - If the loss be

Bailment

occasioned by inevitable accident he is not prima facie liable but may be pressed so. Jones 95 1 Pow C 251

Having subject himself also by breach of trust for any depredations Ex-Parsons or hirers to ride to C. & rides to D - he is liable for any loss which happens whether inevitable or not Dyk 915 1 Pow C 250 1 Ba 244 Jones 95

These rules are applicable to bailments of every description - Dyk 917 Cro J 244 1 Ba 237 1 Pow C 253 Jones 95

Locatio or Conductio

This is a delivery of goods to be used by bailee for a reward to be paid the bailor Ex One hires a horse to ride 5 Dyk 913 - / The bailor is called the lender or locator & the bailee the hirer or conductor Dyk 913 1 Bull 72 Jones 50.119 1 Pow C 251 1 Ba 243

The Conductor obtains a convenient & unique property in the thing bailed & the Locator has the absolute right to the stipend or price Jones 119.

This bailment being advantageous to both parties the bailee is only bound to use ordinary diligence & is liable only for no less than ordinary neglect - This is deemed in sense of the bailor & in the Dyk 915 Ld Holt says it doubt that the hirer is bound to use the "utmost diligence" - If this is the case he is liable for slight neglect & must stand on the same footing as a mere borrower - The proposition of Ld H. is more distinct as the case before him was that of a mandate - He & Powell make a distinction between the case of a hirer & borrower & both say that a hirer is not liable for theft - I think a hirer is exempted but a borrower is not prima

Bailment

facias expired. Jones 99 has traced the opinion to its source & finds that Holt was in it from Bracton where the word sile identifying is used - In latin equality is often expressed by a superlative adjective where the quantity itself is not superlative thus benignissime is always rendered slight not slightest

There is on principle no decision requiring more than ordinary care in a bailee so that Holt's opinion is unjust & the bailee is exposed for losses occasioned inevitable accident or superior force however they may be occasioned & if there is no want of ordinary care he is not at all liable - Jones 126 - x 3 Johns R 70

Where a chattel is let for hire the bailor is not bound to keep it in repair neither is the bailee bound to repair the if he wants to make it he must repair - This applies where there is no express agreement & no fault in bailee - Inn keeper or hirer is liable if he doesn't lock a horse up one night - fact is want of ordinary care. 1 Bauld 321 1 B & F 31 Doug 720

Pledge or Pledge

This is the delivery of goods as a security of a debt or duty from bailor to bailee. 1 Brot 295 Ld Ch 113 1 Ba 237 Jones 50 104 4 Com 258 Esp 524 - 1 The bailor is called the Pawnor & the bailee the Pawnee 1 Pow & 251 1 Ba 243 Selet 173 1 Bull 72

If one delivers goods to another under an absolute bill of sale but it appears from another instrument, that the delivery was intended to secure a debt to the vendee may sell the goods when he pleases & that subject to vendee's right to sell vendor may redeem them - fact is a pledge - 1 Ch 131 114 -

Hand bailment being confined to both parties the Pawnee is bound to use ordinary care & is liable for ordinary neglect. It is advantageous to Pawnee in securing the debt & to Pawnor in redeeming his chattels. Pl. R. 917 Sal 523 1 Pow C 252 Jones, 105 108 1 Com 235.

It was held in Southcote's case Pl. R. 917 that Pawnee was only diligence to keep the goods as his own for Coke says "he has a property in the goods" therefore he could not be liable even for gross neglect if he treated the goods as he did his own. This is not true for every bailee has a qualified property in the thing bailed. Lord Holt decisively argues that it is not law for it places him on the ground of a depositary. Pl. R. 917 4 Co 83 1 Burr 89 Jones, 105 1 Pow C 252 Sal 523

The pawnee is secured in case of robbery for the same reasons as bailees is & they are both bound to use the same care. Jones if caused by his own fault Jones, 105 Pl. R. 916, 17 Sal 522

Holden v. Ho in Southcote's case 4 Co 83 that if the Pawn is stolen Pawnee is not liable — to qu. for the pawnee in this case would be esteemed for the most gross neglect — & it is opposed to the overbalance weight of authorities. 1 Burr 89 1 Bro 237 Palm 551 Yelv. 178 Jones 61. 106

Jones holds on the other hand that a Pawnee is liable for theft in all cases for if he suffers goods to be stolen he does not use ordinary care — In the case of a depositum when the loss is occasioned by theft / finite he may be liable — So a Pawnee may be liable — The proposition that Jones advances is not true in fact — for any person may lose his goods by theft tho he use extraordinary care — it is a question of fact whether ordinary care was used or not — that this is so is not only recognized by all the authorities but also laid down by Jones himself according to whom a loss by theft is inconsistent with

ordinary case in L. Holt says (Bk 917) a factor is excused in case of theft if he has used ordinary care & a pawnee is on the same footing as factor. The result seems to be that neither Holt or Jones are correct. 1 Vent 121 Salk 522 1 Raw C 252 id 4 Com 258

The Pawnee like every other bailee gains a qualified property in the thing bailed. His property may be destroyed by payment of the debt & interest on the day of payment when the whole interest revests in Pawnor (1 Bar 237 Cro J 244 Jones 111 Yelverton 4 Co 83 Bull 72 4 Com 258 id 2 Hill 27) It is the same thing if a tender is made & pawnee refuses to accept - for Pawnor has done all that is required of him. If thereupon payment of the debt be or tender and demand of the pawn on the day of payment the Pawnee retains the pledge he is a wrongdoer & liable for any subsequent loss of property however it may happen Ep 625 Bk 917 Salk 513 4 Co 83 1 Raw C 253.

On refusal to set aside a Pawnor may maintain Detinue trover or assumpsit & it makes no difference whether the refusal is made by Pawnee in person or by his servant for qui facit per - but the tender must be one which acts regularly in his quarters business (1 Bar 237 Cro J 244 Jones 111 Bull 72 Moor 841 Salk 441 4 Com 258 1 Roll 60

It seems to be the better opinion (Shel 309 R 522) that a refusal to receive the pledge on tender or payment of the debt is an indictable offence at C.L. (Bum of other bailees) The rule seems founded in policy & is meant as a guard to Pawnor who is generally in embarrassed circumstances & exposed to oppression & hindrances the delivery is usually resist. Jones 111 says that that on tender & refusal the pawn comes to be a pledge & Pawnor a depositor & a wrongdoer is liable only for gross neglect (Finch) but the pawnee in this case is liable at all events. Coutts 277 1 Bar 240 2 Ld Ray 218 Contra 4 Com 258 -

Cole, a tender of a pledge on the one hand the property pledged rests in pawnee so on the other hand the money tendered becomes the pawnee's & the pawnee becomes depositary of it & he must always have it ready when the pawnee calls for it or the effect of the tender is done away - He must take the same care as any other depositary the bailee in involuntary one he is liable for gross negligence - Co. 244 Bull 72 1 Ba 237 / Que Ed 4 254 3 Hl 27 - / £289

Pawnee's right to use the Pledge

This right is said to be founded on the Pawnor's consent express or implied - This presumed assent exists or not according to Jones as the pledge is made better or worse or not affected by the mending - The cases in which pawnee will be made better by mending one pledge - Ex Setting dog - for by use he is confirmed in useful habits - Jones 112 a

The same presumption exists if the pledge is not made worse by mending as jewels &c - Jones however agrees that pawnee cannot then set his risk & is responsible for loss occasioned by violence - Semb. some small injury might arise from use but not enough to prevent the pawnee, unless Pawnee uses it by way of indulgence & it is advantageous to him only Tal 522 1 Ba 237 1 Burr 89 Ed 4 917 Bull 72 4 Co 238 Co. 124 1 Roll 338 Bull 72

If pawnee is at expense in keeping the pledge he may use it for the purpose of reimbursing himself - he must however use it as small as if a horse is pawned he may use him to reimburse the expense of keeping & his liability is not increased by the use as in the case of Sewallow - It seems according to the Roman Law that Pawnee was obliged to account for the benefit received from the thing pawned - but there is no such regulation by the C.L. - Ed 4 916 Tal 522 Cro 625 4 Co 238. 258 Jones 114 Co. 124 Bull 72

If the pawn will be made worse by them he will not be allowed to

Goods found.

Pawnees right to use the pledge.
to use it - no presumed assent - & this is the case with most pawns -
P. & Q. 17 Jones 113 4 Com 258

If the pawnee uses the pledge when by law he is not allowed to use it he not only uses it at his peril so as to be liable for loss, but he is immediately liable to an action of trover - for an unlawful use is a conversion & a conversion in the law of trover may take place in three ways - unlawful taking, unlawful using & unlawful detaining - In the above case there is an unlawful using & the pawnor is not alleged to make any demand - There is no direct authority to this division of trover but (seems) it must be so from the nature of the case - 3 Bu 257 266

Holt says (P. & Q. 17) the law as to Pawns applies to goods found - This rule as laid down is very indefinite - The meaning must be that the degree of care required by the finder is the same with that of the Pawnee - 1 Pow C 252 says that the law implies a contract on the part of the finder to keep the goods safely on the ordinary diligence - Bouton Oro 219 & some other books - & that a finder of goods is not bound to keep them safely, neither is he liable for negligent keeping - 2 Bulst 21-91 1 Ba 243 Esp 99 1 Salk 123 Ow. 14 -

Seems Holt's rule is the true one - seems qu. How does it comport with a principle that where the bailment is advantageous for the bailor only the bailee is liable for gross neglect only? The finder derives no advantage from the bailment - for he can only recover for his trouble & expense in keeping the thing found - But there is a great difference between a finder & a depositary - In the case of a deposit bailor sought have chosen whom he pleased & have taken security or made a contract that they should be kept safely - Seems in case of a finder - for he is not strictly a bailee & it is not strictly a bailment - The goods are not delivered to him he acts as he pleases in taking them he might then act to keep them with ordinary care or not

Bailment

Pawnee's right to use the pledge.

Cooke Treat. at alt.

The decision in Co & 219 was right the doctrine laid down was wrong. If found letter & it proceeded in his hands. The owner brought trover but did not allege a refusal to deliver held that he could not maintain the action for nonfeasance nonfeasance would not support trover but that there must be a misfeasance. The opinion in this case is obiter & opposed to all the authorities i.e. that the finder is not liable for neglect in keeping Co 2 219 5 Burr 2827 Ld 145 b 65 5 Ba 257 269 E.p. 599 Mod 237 8 Co 146 b we have an b 35 which agrees with Holt's opinion providing a compensation for the finder for his expence & trouble in keeping.

Semble a finder at C.L. can never recover a compensation for it is settled at C.L. that he has no lien upon the goods found for his trouble or expence. If the owner offers a reasonable evidence to prove the goods are his & the finder will not deliver them he is liable immediately to an action of trover tho his just expences are not tendered or paid. If he can recover in any way it must be by Ind. Lect. for work & labor done or money laid out in which case the Court must imply a special request as well as promise which a Court has never done. Bl R 1117 2 Wils 254 E.p. 585 Hob 351

If goods are found on the high sea the finder is entitled to salvage according to the Maritime Law Bl R. 293 2 Wils 254 5 Ba 270 Semble he has no C.L. remedy for it is a voluntary mistake (for which Ind. 10 b E.p. 879 95) or his part & at C.L. a voluntary mistake will not support an action. There is no privity in this case between them & the finder did not bring the owner of course there can be no implied contract & clearly there is none expressed 2 Wils 258.

Where one is compellable to do an act & another at his request does it for him the latter may have an action. for there is an express contract

The owner can have been guilty of no tort so that the finder cannot recover on that ground - the case of Salvage is diff. on that depend upon the principles of Compensation 1 Bk 293 5 Ba 270 n

Generally the finder to restore the goods found on demand by the owner is merely prima facie evidence of a conversion - for the finder must act upon reasonable evidence & he is not obliged to restore the goods unless there is satisfactory evidence of ownership - 2 Bulst 312 Esp 590 post

Decided by S.C. Ct. - that if one not the owner of goods bring trover against the finder & recover by false testimony that it is no bar to an action brought by the owner / 1 Root 545 2 Ba 280 / see qu. Semble it is contrary to principle & the analogies of law / see 1 Ba 242 n / Ex. N. Y. pay. to one claiming to be adm. to another & produces forged letters of adm. - The true adm. may recover the same debts - for the payment was voluntary - Semble if the first adm. had sued the debtors & obtained judg. against them & then they had paid him - so to in case of an Ex. who produces forged will / 3 Bk 125. 2 Ba 11 1 Bl 181 669 182 699 Doug 181 - / - for where the law has once compelled a person to pay it will not compel him to pay again for the same thing - see 4 Bk 62 L. 131 Esp 3.

So too the estate of a bankrupt being completely vested in his assignees if his creditors voluntarily pay him their debts, the assignees may sue & compel them to pay them over again - Semble if the bankrupt goes into another country & there sues on a debtor in his own name & recovers the debtor is not obliged to pay it again to the assignees / Co. B. L. 370 / Semble therefore that a recovery in one action will be a bar to another. Tho' if the finder delivers the goods found voluntarily upon reasonable evidence of ownership & a true owner afterwards sues him for them he will be liable. 2 Bulst 312 Esp. 590

Bailment

If the Pawnee has tendered the debt & expenses in the case against the pawnee the latter is entitled to the debt due. But he must make a demand before he can bring the action. The Pawnee (Cite 285) must keep the money for Pawnee & pay it when demanded. 1 Redf 241 31 1 Bac 238

If perishable goods are pledged & decay so that they are of no value the Pawnee is still entitled to his debt - the duty still remains & the pawnee must be a security not payment of the debt (Redf 179 1 Burr 209 Bac 238 1 Bac 238 4 Com 258) So also of insurance contracts where the hostage dies or is retaken Doug 614 2 Burr 1734 1 Bl R 663.

While the pledge remains in Pawnee's hands unimpaired he may maintain an action for the debt - for his right of action not suspended by the pawn - It is in the nature of a mortgage. He he may make an agreement not to sue while the pledge remains in his hands & to rely on that only. Fitz. 210 Ex 85 Redf 179 2 Lev 116 4 Com 258.

If the money is not paid at the day appointed the property in the pledge becomes absolute in the Pawnee at Com Law. In Eq. Pawnee is entitled to redeem - for it is the same as a mortgage 3 Litt 305 2 Burr 691.8 1 Bac 238 Shep 106 1 Burr 205 4 Com 258.

Sum of personal chattels (Bend.) for money has a good property & not a mere lien. 8 John 96 2 Caines C.E. 200 5 John 250 Wes 1. 378.

The right of redemption is not taken away even if there be an agreement that if the property is not redeemed on the day of payment it shall vest absolutely in the Pawnee. Redf 114 2 Burr 698 1 Bac 238.

Factor cannot pawn the goods of his principal to secure his own debt so as to give the pawnee a lien upon them against the principal

He may indeed have the pawn suspended upon him but not as factor - He can not even transfer a lien which he himself has upon them - for this is a personal right which is not transferable - If then the factor should die this the principal by paying the factor 1/2 by the last decision without paying him 7 East 5 5 3/4 504 / may maintain trover against the Pawnee - The factor has nothing but a lien upon the goods of his principal to secure his own debt - this cannot be transferred - Semb. there must be a demand upon Pawnee tho this is not mentioned Stra 178 1 Ld Ray 362 4 Com 227 -

After the day of payment has passed the pawnee may sell the property or in other words assign the pawn - for the property at law is absolutely vested in him - According to S. he is liable in Eq. for that part of the sum it sells for over & above his just demand - I know of no rule to entitle the Pawnor to receive the remainder - ought he not to be subject to the 4 & 5 Ann. 16 ch 205

If the lien holder according to Com 124 as cited 4 Com 258 - that the Pawnee before the day of payment may assign the pledge / 1 Ba 239 1 Ves 35 / sed qu - Semb. there of mere use not law - I Buller N.P. 56 - / says that a lien upon personal property is a personal right & cannot be transferred & so says L. Ellenborough - East 6 a 1 cd - Yelet. 178 Cro J 244 - 5 w & 1306

A sale of the property before the day of payment would be nothing more than a sale of the lien the pawnee had upon it - There are also other rules assigned to this doctrine as laid down by Com - 4 Com 258 -

It is a well settled rule that a pawn cannot be forfeited before the day of payment not even by pawnees mines - not even pawnees lien

upon it. It is also agreed that a man forfeits by his crime what he can convey in his own private right. From these rules it would seem that a pawn or lien upon it cannot be assigned. 2 Ba 376 1 Bnd 8 12 Co 12 Moor 100 Cro E 556.

Broke fa high authority, also lays down the rule peremptorily that a pawn cannot be alienated before the day of payment. The pawn is merely a security for the debt & the ultimate right of property rests in Pawnor till the day of payment. A lien of this sort is merely fiduciary & if Pawnee could dispose of the pawn Pawnor would be in danger of losing it forever. Ex Gow Leggan. On principle therefore as well as authority the pawnee has no right to assign before day of payment. 1 Bro 238 1 Ves 359

True a mortgagor may be assigned before day of payment but this is diff. from a pawn. The land cannot be moved away so that mort. is in no danger of losing it. 2 Vern. 698. 9.

A pawned goods to B for £20 & B pawned them to C for £50. A brought a bill against C & the Court held that he must pay the £50. But this proves nothing, for as Eq. would have nothing to do with the bill till after day of payment & of course forfeiture it must have been then but so that it is the same as if the transfer had been made after day of payment. 2 Vern 641 Pa. Ch 419 Ep 583.

A pawn cannot be taken in execution & attached by pawnee creditor. If he could sell it before day of payment his creditors could take it. 1 Ba 252 Dy 67 Ow. 124 4 Co 258

The Pawnee on the other hand may forfeit his right in the pledge by treason or felony. But he can't assign it without injuring the pawnor. The lien is in his hand & cannot be assigned. The

A forwarded goods to B. who forwarded them to C
without notice of A's claim - held that C.
could retain them agt. A. till his debt was
paid 13 Abb 105

King's bench cannot have it in case of forfeiture without paying the pawnee his debt – for he has no higher right than the pawnee who cannot be injured by the forfeiture. 1 Bulst. 29 Yelv. 79 1 Ba 235 4 Com 250

Formerly deemed essential to a pawn that it should be delivered to pawnee at the time the debt accrued – If delivered afterwards it was not considered giving the creditor any special property in the pawn but merely as a license to pawnee to take posn & he was not considered as a trespasser in so doing – This delivery was of course countermandable. Semble now – so that if C delivers goods to B as security for a debt already due from C to B & B becomes a pawnee with a qualified property so that C cannot countermand the delivery. 1 Ba 225 2 Lean 24 Yelv. 164 Nov. 350 Contra Dy 49 / It seems that this rule is founded on an agreement between C B & E that the delivery should be to B unless he were E's agent & this agreement must exist before the delivery is countermanded. Bull 35 1 Bulst 68 Esp. 576 –

It was formerly doubted whether if no day of payment was fixed payment or tender would revest the property in the pawnor unless made during the joint lives of the parties – Now holden that where no day of payment is fixed the pawnor has a right to redeem at any time during his own life whether pawnee is living or not. 1 Ba 239 Cro J 244 Yelv 178 2 Co 74 1 Bulst 29 4 Com 258 – / He may bring personal repleviny after him. 2 Chancery Cas. 200 / 10 John R. 471 Esp. 258.

But Pawnor's Ex.rs & admrs cannot redeem at Law / Semble he may in Eq. / for in justice there ought to be some limitation to the right of redemption at Law – Semble the pawnee may be injured for the he might sue the pawnor in his life time yet he might be insolvent & the only remedy might have would leave his heir – he could not assign the bond before the right of redemption had lapsed & the pawn would die with his heirs – tho if there was no day appointed for payment the

Immanuel

might sue at any time - 1 Ba 239 1 Bulst 29 Cro J 244 Yelv 178 4 Com 258 -

Said 1 Ba 239 / rightly / that there ought to be a day of redemption in Eq. after Pawnor's death - Here the pawnee cannot be injured - for he may assign the pawn in this case - but he cannot where the right of redemption exists at Law - 1 Brut 205 2 Vern 691 -

If a day of payment is fixed the Pawnor's interest is not forfeited by his death before the day - his personal representatives may redeem at law by paying or tendering it - If the Ex. pay at the day the absolute property is vested - if not he has an eq. of redemption 1 Ba 239 1 Bulst 29 4 Com 259

If no day of payment is fixed & pawnee before he dis. delivers the goods to a Stranger without consideration tender is to be made to his Ex. & not to the stranger & if upon such tender or the stranger refuse to deliver trover lies against him - Cro J 244 Yelv 178 1 Ba 233 - / If the Pawnee is living & the delivery is on consideration tender must be made / Yelv 176 4 Com 259 / to the Ex. - or to the Stranger Bulst 29 Sand -

If he delivers goods to B as a mere donation to C the delivery is accounted revoked before C obtains the actual poss. - for the delivery was without consideration & it is holden that a parol gift of goods without a manual delivery transfers no interest so that an action will lie against donee / Sand / after a demand should be made them - Hob 95 1 Ba 239 260 Ev 577 2 Leon 30

If the pawn be lost through a simple or ordinary case the debt was considered as extinguished - qre - since the pawnee is liable to

Bailment

pounds for the value of the goods - Jones if ordinary diligence is used. Jones 106 Ed 1 & 917 Buc 1924

Locatio operis mercium vehendarum et operis faciendi

This is the delivery of goods to be carried or to be subjected to some act of the bailee for a reward to be paid by bailor 1 Bac 343 Ed 1 & 913.17.18 Bull 72 1 Pau C 253 -

When to be carried it is called "locatio operis vehendarum mercium" & "locatio operis faciendi" when for some act to be done. This class includes Common carriers Innkeepers & Private Carriers - Jones 132 Ed 1 & 917

Private Carriers

This is any person not exercising a public employment & a delivery to one includes a delivery to a tailor blacksmith or any one exercising a private professional character - so too it includes a delivery to a porter renderemonter or any private agent Ed 1 & 918 Jones 50 128 -

The bailment being advantageous to both parties the bailee is bound to use ordinary care & is only liable for ordinary neglect. 1 Roll 18 1 Bull 154 12 Mod 487 Jones 14 22 32 128 131 1 Vent 121

A bailee to bailee of this class is prima facie entitled in case of delivery on demand where he cannot resist 1 Ld 84 Jones 128 138 1 Vent 89 Ed 1 & 918 Hale 131 Mo 462

The second class, carried by that bailee is special or not without an hire is ordinary care not all this is a question of fact - 1 Vent 238 5 1 Roll 4 Ed 1 & 918 Mod 43 Jones 188

A carrier of passengers is not like a common carrier
An insurer but is liable only for negligence & misconduct
11 East 120 2 Esp 533. 2 Camp 79

§ 995

If the thing bailed be distrained by bailee's landlord for rent it may be bailee is liable for permitting it to be distrained instead of his own is ordinary neglect & independent of ordinary neglect bailee (Bend) would be liable for money laid out & expended for bailor - for where one is compelled to pay the debt of another he can have an action against him whose debt he has paid Jones 141 3 B&P 8 Burr 1408

According to Jones 86 143 if money is delivered to a smith to be wrought into an instrument the smith is not a bailee of the property - the contract is a mutuum & the property cannot be identified in the smith - for say he the form of the property by the terms of the contract is to be altered so that it cannot be identified & in contemplation of law cannot be specifically redelivered - Secondly the reason is fallacious for altho the bailor cannot identify it yet the bailee can & the thing may be proved the same - Thirdly the rule is a wrong & hard one for the smith may be injured as the metal may be lost before it is changed without his fault -

In the case of a mutuum this rule would be true - for if lead is delivered to a person to be ground the miller would at all events be liable - for he gains an absolute property in it as soon as delivered & it undergoes an absolute change - 2 B&P 404 Popham 38 -

When property is delivered to a person to perform work out of skill about it in his profession manner the law implies that he will return the thing bailed & that he will perform his work skillfully for when a man holds out to the public that he will [illegible] contrivance for others there is an implied agreement that he will do it skillfully. 1 H&B 158 1 Co 54 3 B&P 165 13 Mund 324 Esp. Dig

Bailment

If the act to be done is not in the line of his profession the law implies no engagement that the work shall be done skillfully. A Bailee in this case cannot be subjected for want of skill unless the made an express agreement that the work should be done skillfully. 2 Bl 1166 Jones 189 Esp 601 1 Ch 131 138 - £993 quaere -

If goods delivered to bailee of this description accidentally destroyed while unfinished by a neglect of that degree of care which the law requires of him he is entitled to no compensation for his work - for the work alone has been of no benefit to bailor & bailee has neglected to do his duty - & Semble it would make no difference were the work finished - Semble if they were lost without his neglect - entitled to recover for the work done. 5 Burr 1592. 5 Esp 86

Jones says that ordinary care does not make the bailee an insurer against fire unless it must be proper for him to insure & charge the insurance to the bailor. The certainty cannot be bailee unless he is infamous & according to the common understanding of mankind a bailee is not bound to effect an insurance against fire & theft.

Public Bailees.

1st Common Carrier is any person who makes it his business to carry the goods of another for hire. 1 Sk 27 Ld R 918 Jones 149 Hob 18 1 Ch 84 Esp 611 24 Alle 93 1 Ba 243 1 Salk 189 Cro E 331 1 Com 212 1 Roll 2 Lath 81. 2

Formerly doubted whether any other than a common carrier could fall within the description of Com. Carrier. It was first extended to common hoymen in the reign of Jas 1 & to his masters in that of Car 2. Jones 152 Hob 17 Cro E 330 Ld R 918 1 Ba 220 Salk 190 238 12 Mod 487 Cro J 338 2 Lev 60 -

10 Edw. R. I. 2 They are to be answered for whatever has been stolen or lost by the Crown or any other person. 6 Edw. R. II.

When goods are lost or entirely destroyed during the voyage the master is bound to account for the value according to the current net value of goods of like kind at the port of receiving. 8 Johns R 213 — 2 in Cond. and be allowed if found a mercantile is impossible to the Master demand. 1 Bl.

The Carrier of goods laden on deck is not liable in case of their being thrown overboard for the preservation of the ship. 8 Johns R. 113 — no is there any contribution in that case.

It is questionable whether a common carrier or Ship Owner can contract for a restricted liability 3 Hill 623. 3 do 20. but other bailees may. 19 Wend 246 272. 282. Story Bail 20. 3 Hill 20. unless in case of fraud on the part of such bailee.

The owners of ships employed to carry goods for others are common carriers & consequently the entire maxim that accompanies the bailee or owner in Ex. Principle the owner alone would be liable but on policy the bailee is also liable & is considered as a com. carrier - for the owners are not generally known & the contract is generally made with the master & under the owner & bailee may be in diff. countries - Bail 440 1 Bl R 78 3 Esp 259 Dwalle 62 2 Esp 623 1 Com 212 Bean 29 101

By 7 & 8 Geo 4 it is provided that where a loss occasioned by the master misconduct or delinquency the owners are liable only to the extent of the vessel & freight - The master is liable - 1 Bl R 1878.

If a com. carrier having unnecessarily for carrying goods refuses to carry the man being offend his line he is liable to an action on the case - filling policy - for by assuming the office of public carrier he impliedly agrees to carry for any person who shall offer - Bell 70 3 Ba 180 Pa 344 2 Term 317 3 Bl 166 1 Esp 163

The a Com. Carrier cannot refuse yet he may make a conditional compliance - Ex. That he will not carry goods unless made acquainted with the circumstances of the case & unless he is paid a compensation according to the value of the goods carried - the insurance & risk must be considered the lien is liable increased by the value of the articles. 1 Bum 2298 Esp 122

The bailment being advantageous to both parties it would follow according to the good rule that a Com. Carrier would be liable only for ordinary neglect - In the reign of H. 8 he was held not to be liable for ordinary but in that of Eliz. & Jas. he was held to be so even - The rule now is that a Com. Carrier is liable for loss occasioned in any way except by inevitable accident by public enemies & by act of bailor

Cobb assigns a diff. reason for these liability - that they receive a reward 1 Burr 89 1 Roll 2 4 Com 84 1 Ba 345 Mo 152.

The liability of a Com. Carrier is extended further than that where the bailment is accompanied to all parties for public policy requiring it & upon an implied contract of private carrier unless he is known like bailees or Com. Carriers on account of his office & if their responsibility was not answered fraud & collusion might be practised 1 Roll 70 2 Ba 478 3 Burr 1595 Str 1145 1 Atk 17 Sal 143 18 Pow C 253 1 Bent 609 Holt 131 1 Wils 281 1 Burr 238 1 Ba 345 Esp 619 Cobb says he is liable on account of his reward but a lenior is entitled 1 Wils. 1 Ba reward - the reward does not extend his liability 1 Burr 89 4 Co 84

A Com. Carrier is not liable to the value stated unless in case of fraud & the owner of the goods gratuitously has made the declaration Burr Esp 121 1 Bent 604 Coutts 185.

A Com. f. is in the nature of an insurer against all events except such as cannot happen by the intervention of man - the public enemies & the laws & loss by fire occasioned otherwise than by lightning cannot render him liable 1 Hl 33 Str 128 Dy 66 2 Hl 113 Esp 620 1 Roll 70 1 Wils 281 Jones 147 4 Adm & Ell 10 1 Ct Ro 487 10 Johns 11. 10 Ch 1. 1 Bay 98

He is not exempted from loss occasioned by robbers or insurgents for they are not public enemies within the rule - Pirates are within the rule & the loss occasioned by them the ship is exempted - Some loss occasioned by people under pretence - in they are more robbers - 1 Burr 190 238 1 Ba 218 Esp 620 Coutts 85

If a tenant makes it necessary to throw the goods overboard the carrier

* Held whether there was negligence or not is a question of fact for the Jury to decide - 6 Johns R 160

4 Burr 127 7 Bl R 160

A common carrier may be sued either in assumpsit or case for a breach of the Bailment. if the first method is adopted all must be joined as deft. or it is matter of abatement if the latter a non joinder of deft is of no consequence – 1 Ld. 754 2 Ld 109. 270. 2 1 Show 29. 101 S.C. 3 Mod 331 2 Ld. 440 5 Burr 2611 1 Wils 281 5 T.R. 649 6 Ld 369. 3 East 62 5 Bos. 365 12 East 89 5 Bingh 54 3 Maul 168 contra citing 2 Maul 338

is an act of God. There is one case where a box of jewells was thrown overboard in a tempest & the Master held liable yet in all probability the box was light & could have made no difference & no doubt the question turned upon this point. 2 Bent 280 11 Co 63 1 Ba 345 2 Roll 561 Jones 154 Ep 620 1 Roll 279 Cll. 93.

In case of loss by water carriage the master owner & freighters must average the loss in case where the goods are thrown overboard & all who are benefited by the act must contribute to the loss. This is a rule of the Law Mercatoria not C.L. no average is required. 3 Ba 594 1 East 220 Bacon 148 2 Hz 407 H.Bl. 291 Kent 60.1.

If a Com. C. voluntarily ~~injure~~ goods to mariteuce accident he shall not be excused. If a Com. Shipmaster fails to dem[illegible] in tempestuous weather when in all probability the goods would be lost. Ep 620 Hea 128

A Com. C. is regularly excused where the loss is occasioned by barbarous act. Ep. 620 Holt 1 Ba 128 or perhaps where the goods are in a state of fermentation & the spoilment. The carrier was held not liable also where the carrier was given, fell & the owners insists on his carrying them. He willing to take the hazard the carrier is not liable. Bull 67.74 2 Show 127 1 Ba 344

If subject the Com. C. the goods must have lain out wholesome his possn. or under his immediate care & control. Thus if the owner sends his servant to take one of them & he takes charge of them & they are lost the Carrier is not liable. Ep 621 Bull 70 2 Show 527 Hea 690 1 Ba 344

But if Carrier merely requests a passenger to have an oversight over them the Carrier is liable. & if the goods are under a servant's care the Carrier is liable for any loss occasioned by his own act. 1 Roll 2

300

Common Carrier — Bailment

Cro J 330 Yd 17 1 Ba 344.

A C. Carrier is liable for the contents of a box the ignorant of them unless he discharge himself by special acceptance Bull 70 Str a 145 Carth 485 1 Ba 345 2 East 128 Jones 148 Esp 321

According to this decided cases altho the Carrier was misinformed of the contents he was held liable unless he discharge himself by special acceptance In one of the cases there was a box containing dollars & the owner informed him that it contained silks - the Carrier was held liable In the other the box contained £ 200 & the Carrier was informed that it contained a box of stockings - the Carrier was held liable for it was said he might have made a special acceptance. Holt in these cases said the misinformation might have gone in mitigation of damages. Cliff Bull 70 1 Vent 238 88 1 Ba 345 8 Rol 135 Dr. 8 130

Williams & King approbate the above cases & they are now reconciled - Dr King says it is almost a current opinion in the Court of K B agrees with him 4 Burr 2300 Str a 145 1 East 610 Jones 148

To make a special acceptance it is not necessary that there should be a personal communication between the bailor & carrier - an advertisement in a newspaper is suff. & whether it is a special acceptance or not is a question of fact - & the Jury may infer that the bailor was acquainted with the fact. Bull 71 Burr 2298 Ld 622 Carth 485 1 Ld 208 8 Mod 531.

Under a gen. acceptance (except in case of fraud) the carrier is liable for what he receives but under a special acceptance he is liable only for so much as he undertakes to carry & his engagement extends to more than is contained by his acceptance & not to anything to

Trover lies agt a common carrier for goods in his posn or which he has delivd to a wrong person or in any other way actually converted them - but if they were lost or stolen case & not trover is the remedy
4 Maul 615 Lat 655 5 Burr 2825 Peake 49 1 Burrt 391 4 Esp 157 -

A stage proprietor is bound to convey his passenger in a vehicle that is safe & if an accident happens from a defect in construction that, out of sight & not discoverable on ordinary examination he is liable. 23 Ed 532

which his reward does not extend he is not a Comn. Carrier & is not liable as such where a bag was delivered to a Comn. Carrier containing £400 & the bailor said there were but £200 the Carrier was held liable for £200 only. Put supra & Esp 621. / qre whether he ought to be liable to any amount as the case might be in such cases of deceit. 3 B & C 133 Mc 158.

In one case the bailor having concealed the value the Carrier was held not liable at all but it was an amount of a special nature made by an advertisement the contn. of which the bailor knew & did not comply with it. 17 Ch 298 Esp 622.

The master of a stage coach who receives a reward for passengers only is not liable in case of baggage lost as to that he is a mere Mandatory. Cowp 25 Salk 281 B & M 70 2 Show 128 1 B & C 243 Esp 622

The Comn. Carrier is liable without actual payment beforehand & without a promise to pay for he receives his pay on a quantum meruit. He need not take the goods without payment or a promise of payment yet if he does he is liable. No change hence it is not necessary that the goods be lost in transitu — suffice if they are lost at the Inn where he lodges. Cow 57 Salk 1 B & C 343.

If the customary course of business is to deliver them to the consignee or if he makes an agreement to deliver them he is liable in case of loss before delivery. But he is excused if he can show that the custom of the place did not require him to deliver them or that he made no agreement — the onus probandi lies on him. B & K 96 3 Bulst 129 Esp 623 Cow 57 1 B & C 345.

When the custom of per the Carrier not to deliver to the consignee

lat to deport the goods & keep them for him his liability as Const. Carrier ceases. If he keeps them in a close house without reward he is a depositary - if for reward he is a bailee of the 3rd class & liable for ordinary neglect. 4 Mk 385 Esp 528.

If the Consignee directs Consignor to send the goods by a particular carrier he & not the Consignor is entitled to an action in case of loss - Consignee in this case is the bailor & Consignor in making the delivery is merely his agent - Sends on a gen. order for goods. Consignor is entitled to the action - for he is bailor - so where Consignor makes himself liable for the price of the carriage & sum the risks he is entitled to an action the Consignee should direct the goods to be sent by a particular carrier - the in this case either might maintain the action. 8 Mk 330 Camp 294 1 Pow & 343. 358 Bull 35 Esp 576 Burr 2680 13 R 559

Ct C. L. a Post Master was not appointed because he was considered as an officer in a private capacity of warehouseman & a Const. Carrier for letters entrusted in the mail - Sends now for by 12 Car 2 he is made a public officer. 2 Mk 640 Sel 17 Camp 734 14 Jones 153.

This officer acting in his official capacity is in some way similar to a Const. Carrier - he enters into no contract - he receives no hire for his own use but for the use of government & it is an indispensable requisite in a Const. Carrier that he should receive hire - the post master indeed receives a compensation from government - Policy forbids his liability - But he is liable for default in his servant or under post masters - same reason, public officers - but he is liable for his own private faults & for private injuries occasioned by his instrument 3 Burl 443 Camp 763 2. 118

Const. Carriers are made liable on the custom of the realm

If Consignor purchases goods for Con.ts filling one to be transported at the risk of the Carter or delivery to the Carrier directs the property of Con.ts so that he cannot bring an action for Coffee 1 Tolar Rs 229/ Sent if sent at Con.ts risk Same not to be paid for until delivery 1 Tolar Rs 229. 1.

The goods of Bailee for a term are taken in exn as they may be & Bailee's interest sold yet if Sheriff sell the whole property Bailee may maintain case against him if he give Sheriff special notice of his interest upon sale 11 L.J. 411 4 T.R. 489. 7 Co 9.

Lindenlaing it is common to count upon the customs of the realm & recite it - this is unnecessary - for the Customs of the realm & C. & are concentable terms. 1 Bia 245 Hob 18 3 Mod 227 1 Salk 33 Hard 285 1 Bu 343 -

When property is stolen from a Cont. Carrier & he being guilty of no misfeasance the only action against him is a special action on the case - Trover will not lie for there is no conversion & it never lies for a nonfeasance & in this case he is liable only on the ground of neglect - Neither will Detinue lie for there has been no detainer. Sal 655 8 Co 146 Hob 251 5 Bur 2827 Esp 580 5 Bu 257 Sal 655

When an action is brot against the owners or Cont. Carriers they must all be joined for as against them the action arises ex quasi contractu not ex delicto - But when against the master it is usually a special action on the case founded on his negligence Sal 440 Esp 623

This rule supposes the owners not to have been guilty of any wrong for if they had they might be sued as tort feasors - They are liable exquasi contractu for the master is only their servant & they receive the freight & when an agreement is made to pay freight it is made to them Sal 440 Esp 623 5 Mk 551 / Therefore under of all the parties can be taken advantage only in abatement - this is a gent. rule / In Salk 440 it is said advantage may be taken of it under the gent. issue - not Cov. Bur 2611 5 Mk 551

2 Inn Keepers

Esp 625 I apply this division under the head of Commodatum but there is no similarity between them - But 78 I apply it under

Bailment

a Mandamus but this is incorrect. Jones 123. 35 treats it under this division.

At C.L. any person may exercise the employment of an Inn Keeper unless it is inconvenient to the public for they are established & not without licence - but he who thus exercises the duties of an Inn keeper becomes liable to all the duties ~~also~~ attached to it. Palm 374 1 Roll 84 Cro J 549.

If the number of Inns become so great the Keepers may be indicted at C.L. as for a public nuisance / 3 Bac 179 4 Bl 168 2 Hawk 174 2 Hales 174 2 Ser. 116 / & in this case those which are set up after a sufficient number are established are to be indicted - so if by being disorderly they become public nuisances they may be indicted as well as houses of ill fame. 3 Bac 179 4 Bl 168 1 Hawk 198 225 Sat 35

By St. Ge. 640 no Inn can be legally established unless according to the St. Second is allowed for one year from the County Court upon the recommendation of the Civil Authority of the town where

Keeping an Inn without licence or furnishing &c. - Hawk. vol St. 646 For a disclosure to the law respecting Inn Keepers the Keepers licence may be suspended by the Civil authority & selectmen till the next County Court which may continue or remove the suspension till the expiration of the time for which such licences are granted - But these provisions (sect) cannot oust the C.L. providing by indictment against Keepers of disorderly houses the 3 houses of no case. St Ge. 643

Duties of Inn Keepers

Their duties are lawfully to the entertaining of travellers & keeping their goods 3 Bac 181 Co 87

An inn keeper on a fair day upon being asked by a traveller then driving a gig "whether he had room for his horse" put the horse into the stable & the traveller & his goods into his inn & placed the gig in the open shed where he then usually placed carriages on fair days from whence it was stolen – Nelson Litt 28 C L 138

An Inn Keeper is not liable in Trover for the loss of articles deposited in his house for the purpose of being forwarded by a carrier 32 L J 353 No conversion –

Eq 97

Bailment

No 3.305

If innkeeper refuse to receive or entertain travellers upon a reasonable price tendered he is liable to an action on the case & can indict for it. 3 Bac 180 4 Bl 168 1 Roll 223.

His case does not extend to the servants of his guests but to their effects only. Semble if a guest is beaten at an Inn the keeper is not liable 2 Bac 181. 8 Co 32

This liability being disadvantageous to both parties the keeper according to the gen. rule of Civil law would be liable only for ordinary negligence but the policy of the law has extended his liability further & it seems to be the prevailing opinion that his liability is co-extensive with that of a Com. Carrier of Civil law. but I know of no authority for this. Jones 123. 135.

Inn keepers are liable for the acts of their servants. policy & they are bound to keep honest & careful servants. 8 Co 32 Bull 73 4 Bl 430 Esp 526 3 Bl 182 1 Roll 95.

He is liable if the goods are stolen by a stranger even without any fault of his. Semble if stolen by the servant of the guest or his travelling companion or by any one who lodges in the room with him at his request. for they are lost thro his own fault. Semble. an Innkeeper is liable in case of robbery tho there is no authority to this point if committed by two or three persons semble if by one not. tho the point is undecided. Plowd. 19 says that he is excused if the goods are lost by means of public enemies by which it would seem that he was liable in other cases. Jones 124 says that he is excused in case of inevitable violence. 1 Ld Ray 274 8 Co 33 5 Mod 27 Cro E 286 3 Bac 183 Esp 525 1 Roll 211 Jones 135 — Dy 266 Moore 78 158.

Bailment

Sd. Coke / 1 Com 211 29 Esp 626 / says he is not liable unless he was been in fault. This is not law 5 Bl 276

As Inn Keeper he is liable for such goods only as are infra hospitium which includes stables & out houses / 8 Co 32 Esp 626 / If then goods are sent from the Inn by direction of the guest the Keeper regularly is not liable in case of a loss - Et. Guest directs his horse / 3 Ba 181 1 Roll 4 / to be sent to a pasture & he is stolen - Semble if he should send the horse to pasture without the direction of his guest he would be liable So if the guest should order his horse to pasture & it should be lost for want of suff. fence the Keeper would be liable - not on the principle of policy but on the ground of ordinary negligence - Bull 75 1 Roll 4 8 Co 32 Esp 625 1 Com 210

His liability is not discharged either by absence sickness or insanity - policy - 3 Ba 182 Cro E 622

An Inf. Inn Keeper is not chargeable as such for his privilege is suspended to the custom 1 Roll 2 3 Ba 182 -

If an Inn Keeper refuse to receive a guest because his house is full & the guest persists in staying & taking his chance the Inn Keeper is not liable for his goods - 3 Ba 183 Dy 158

If the host requests the guest to lock his door & represents it to be unsafe & the guest neglects - qu. the host liable? opinions are contradictory / 3 Ba 183 Dy 266 Moor 78 138 - / Hamb. that delivering the key to the guest does not discharge the host the door be left open & the goods lost. 3 Ba 183 8 Co 33 -

The host is liable if he does not know the kind or value of the goods

Bailment

3 Ba 183 8 Co 33 Moo 185. 158 5 Mk 273 / qu - if the guest denies him

His liability is only in favor of travellers such as load at his Inn for the price charged travellers - It does not extend to neighbors who lodge at his house or to lounders at the common price guests of private houses for he does not receive them in the character of Inn Keeper & the policy of the law does not extend his liability to such cases 1 Ba 183 8 Co 32 1 Roll 3 Shinn. 276

He is not chargeable in the absence of his guest for the loss of any goods for the keeping of which he receives no profit - i.e. - where the absence of the owner is such that he is not considered as a guest - Sem while he is so considered - 3 Ba 183 1 Roll 3. 338 Cro J 188 5 Mk 273 Noy 126 Mo 827 Popk 179.

He is liable for goods for the keeping of which he receives a profit tho the owner has left the Inn & is no longer a guest - Cro J 188 8 Ba 184 1 Roll 3 Mo 877 Noy 126 Fat 388

If a servant is robbed of his master's goods at an Inn the master may sue the host - 8 Ba 184 Cro J 244 Yelet 162 Dy 158 5 Mk 273 -

Remedies

An Inn Keeper may detain the guest till he has paid the whole bill & the horses till he is paid the expense of keeping it - & if they depart without his permission he may retake them or either of them on fresh suit 3 Ba 185 2 Ro 1185 Fa 388 Earth 150 part 312.

He may not use the goods detained for they are in custody of the law as a distress or goods in the hands of a Sheriff - 8 Ba 185 1 Wils 305 Burr 1885 -

A promise by a stranger to pay if he will release the goods is good / Hutt 101 Mo 877 Thea 556 cit supra / for it is not strictly a promise to pay the debt of another but merely to pay a certain sum for giving up a remedy or pledge 1 Burr 486

An Innkeeper in Ct. can maintain no action for liquors retailed to travellers or lounders unless the action be brought within 48 hours id & Ct. Wt. Fuller - 644

In bailments of the 3rd kind if damage be done by the negligence of the bailee bailor may maintain a pauper suit on the premise or tort for negligence - but Detinue or Trover will not lie for there is no unlawful detainer or conversion. 3 East 62 1 Wils 282 2d 319 - Cite -

Mandatum

This is a delivery of goods to bailee to carry or execute about them gratuitously / Jones 75 Ld Ray 918 1 Raym 254 Burr 173 Cro 124 -

This was the species of bailment in Coggs v Bernard & in some of the books was called acting by commission - commoat - for commission denotes a bailment to one who receives a mandate. The difference between a deposit & mandate is that in the former there is only a custody in the latter a performance. Ld Ray 918 Burr 73 1 Raym 254 1 Ld Ray 159 -

This bailment being advantageous to bailor only the bailee is liable only for gross neglect or breach of good faith Ld Ray 919 Jones 73 1 Raym 255 1 Ld Ray 158 161 / But bailee may subject himself by special agreement. Ld Ray 909 1 Raym 255 / 4 Term R 84

The Inn keeper has a lien on the goods of his guest for board lodging & wine furnished the said guest by his the guests order whatever may be the amount if the guest have his reason & is of full age 32 6 L 440

In some cases an agreement to use all necessary care may be implied 1 Str 61 161 / where it is in the line of his profession.

An express agreement to use all ordinary care will subject the bailee for less than gross neglect. But according to the decision in 1 Str 158 the omission of the stipulated care in case of an express or implied agreement is called gross neglect. ~~qu~~ What necessity of this refinement as it confounds all degrees of care. for say the Courts whenever there is no agreement to use any degree of care whether it may be he is guilty of gross neglect & liable if he does not use the degree of care stipulated. The opinion of Holt in Lds 919 seems to favor this opinion.

An agreement to use all necessary skill is not implied unless the act be in the line of his profession. Jones 61 70 however limits that the nature of the bailment implies that he shall use all necessary skill but he is unsupported by no authority & it certainly is not law. vid. 3 Str 165 1 Saund 324 1 Str 158 10 Co 54 Esp 601 Lay 743

Jones 61 70 maintains a distinction between the duty of a bailee when it lies in pawnee & when in custody. Semble there is no reason for his distinction & it is unsupported by any authority. I can see no difference between doing & carrying 3 Str 165 1 Str 158.

Where there is neither an express or implied agreement to use skill or more care than he takes of his own goods bailee is liable for gross neglect only. Ex. A agreed to carry the goods of B with his own at the Custom house & they were lost forfeited being entered wrong. A was held not liable. but he would be liable according to Jones. 2. vid 1 Pow C 233 1 Str 158

If a taylor engage to make a garment gratis he is obliged to use all necessary care & skill - for it is implied in the undertaking - this implied agreement to use all care & skill extends only to the actual performance of the thing itself - in the case of the taylor supra he engages to use all necessary care & skill in making the work but not in protecting it from accident & casualties which are not connected with the performance of the act he is liable in these cases for gross negligence only - tho he may bind himself to be answerable for any casualty Pk 910 18 Bull 73 1 Saund 225 Vin 973 -

But an agreement to use all necessary care & skill or to carry safely will not subject him for loss occasioned by the act of God or public enemies or by lawless act Pk 910. 15

A bailee cannot exempt himself fairly & specially from a liability for fraud - for it would be against law & morals - The omission of stipulations are according to some authorities amounts to gross neglect (Bend not cases) But whether this omission be equivalent to gross neglect or not often - goods are delivered to a bailee on a mandatory bailment & he loses him on the ground of contract - but not before 1 Lev 73 / A delivered goods to B on his promise to deliver them to C & B did not deliver them - he was held liable on his promise - A's assumpsit was maintained - consideration was delivery - in this case if the original contract had not been binding as a contract A could not have recovered in A's assumpsit Pk 909 910 915 5 Mk 143. 9 Geo 3 Ch 1 Ba 241 Dr & 129 12 Mod 487 1 Saund 304 3 Keene 245 394 -

1 Mod 78 says where special damage has been sustained by the party not taking the goods according to the contract an action will lie on the ground of special damage sustained tho the promise was

The rule seems to be that if he intends to do the act gratuitously, does nothing he is not liable at all. Some of the commons doing the act, does it unlimitedly, in 4 Johns R 95 2 Dall 92.

[illegible] usurped the throne [illegible]

gratuitous. But he can only be liable on the contract & if the contract is not binding he cannot be liable for any special damages arising from a breach of it — the question of special damage is subsequent to the determination whether an action will lie or not on the contract for the contract as such is the foundation of the action — ex nudo pacto &c. I think that where an action cannot be maintained on the contract no action for special damage can be sustained. 1 T.R. 140 —

Where there is an acceptance of the goods special damage is not necessary to support the action for where there is a breach of contract damages follow of course. 1 T.R. 909 919 920 —

Said that an action against a Mandatory is founded on his neglect & not on his promise — but if this be the case how can any such promise extend his liability? for his liability can be extended to all lapses — he is not then liable on the ground of tortious feasance & no authority to support him for it is settled that he is liable in Assumpsit Rod 10 T.R. 110.9 910.9. 5 T.R. 140.9 8 East 62 —

A lien is a dormant claim or incumbrance upon the property of another by way of security for a debt or duty & unaccompanied with actual possession (1 Bac Ab 4) from this it would seem that it exists in favour of bailees of the 4th class only & in some cases of the 5th Class — The bailee has a right to the property for the term of bailment but this special property is not a lien — In the case of a depositary & a Mandatory there is certainly no lien for they are obliged to deliver up the property on demand — Bailees of the 4th kind have always a lien — In the case of a pawn the lien is created by the delivery independent of any thing of record & for the object of the bailment is to secure a debt & create a lien — Bac 322 Cro 244 Esp 383 Yelv 178 1 East 4 Pa. Cl. 410 4 Com 258 —

Most bailees of the 3rd kind whether public or private have a lien by a cond. that bailor is to pay - some exceptions Rol. 425 3 Bu 185

A third person who obtains the goods wrongfully from bailee has no lien - for as between him & bailor there is no contract & the bailor in this case may recover against him without tendering the stipend or price to bailee 2 Ld Ra 485 3 East. 585

A Common Carrier has a lien upon the goods until the reward is paid. 5 Bu 2609 L Ra 867 752 Salk 134 2 Ld Ra 842 1 Bam 2825.

Laid down by Holt / L Ra 867 / that if goods are stolen & delivered by the thief to a Com. Carrier the Carrier may hold them against the owner till paid his stipend for the carrier is obliged to accept the goods & is not obliged to demand his pay first.

An Inn keeper may retain the person of his guests at ante 304 / 2 Ld Raym 269 2 Roll 85 3 Bu 185 1 Roll Ra 449 Esp 584 2 Show 261 - & this home de ut ante 304. / 2 L Ra 855 Bull 43 8 Co 147 Salk 388 5 Bu 269 2 or 3 Bulst 268 Esp 584

An Inn keeper may detain the horse for its keeping that he stolen & left there by the thief the owner must pay the charges before he can get him for the Inn Keeper is bound to accept him 3 Bu 183 Bulst by Popham 128 179 2 Roll 85 Esp 584.

But the Inn Keeper loses his claim by voluntarily permitting the horse to get out of his posn. & this is the case with all liens. One may indeed have a bill of sale while another has the property in posn. but this is no lien. A lien implies a right to detain but he cannot detain if he has not the posn. A lien continues as

prop^t already existing - 1 Burr 493 - 1 East 4 & 90

Private bailees have also in some instances a lien - 4 C & P 196 - the bailee is not obliged to receive them till his reward is tendered - So of mechanics in goods - But if they have been accustomed to trust their employers they ought not to have a lien without notice 1 Hud 42 1 Ba 240 8 Co 147 Bull 45 Esp 385 Gilb^t 67 / for the benefit of trade & commerce

An agisting farmer cannot detain cattle till paid - for he is not obliged to receive them unless it is for the benefit of trade & commerce Cro C 197 Bull 45 Esp 585 1 Ba 240

The Captain of a ship cannot detain it for he has no lien upon it for his wages & stores - He is supposed to trust the personal credit of his employer - besides if he had a lien he might keep the ship in foreign countries & thus injure the owners Doug 97 Bad 83 Abbott 460 140 P/C 132 576 12 Mod 440 1 Dall 49

Shipwrights have a lien upon the ship for the work supposed to enhance the credit of it & it ceases upon ceasing to the owners & they can detain only for the ship for their wages Doug 97 Abbott 140 459 Bad 83 Stra 957 12 Mod 440 P/C 132 576 1 Dall 49

In all cases where the bailee relies on a special agreement he has no lien - So where there is a special agreement to pay a certain sum bailee is entitled of his lien - for expressum facit cessare tacitum Gilb^t 66 2 Roll 92 5 Ba 271 Doug 244

A factor or commercial agent in goods has a lien on his principal's goods in his actual possession till he is paid the balance due - but

this lien is lost by delivering the goods to the owner for any length of time but not if delivered to any other person. 3 Mk 110 P 359 Lind 254 Wilk 1154 Burr 494 4 Com 228 1 East 4 Wilk 362 –

Bailees of the 2 & 3 classes the they have a special property in the thing bailed they have actually a lien upon it – thus a depositary & Mandatory have a special property in the thing bailed & can hold it against any person except the bailor – be of a hirer & he can hold against bailor till the term of bailment has elapsed yet this is actually a lien. 1 Ba 240 Cyclopd 172 1 Roll R 128 in 1 Ex & 109. P-81 D-53 –

Rights of Strangers

The books say that if one man bail the goods of another the bailee must re-deliver them to the bailor according to the terms of the contract & not to the owner for bailee cannot judge between the owner & bailor but must perform his contract (Semb. this is not law) the authorities intended to express what it imports but means that bailee may re-deliver to bailor in season & be justified 1 Roll 607 says if bailee re-delivers property to bailor before or during an action against him by the owner it will bar the action – If receives then the action wants otherwise lie Roll 605 607 1 Ba 237 242 7 N R 137

If the owner does not exhibit sufficient evidence of ownership to bailee he is not liable damages if he does not keep bailee free from loss by redelivery to bailor. Ler 2 Ld Ray 86 Ep 597 1 Root 58 –

If bailee in this case sues his Exr he must redeliver to the true owner at his peril say the books for say they are the Exr or claims propr by process of law he ought to return to the lawful owner Exr & is not bound to speculate the personal trust of his testator 1 Roll 607 1 Ba 237

A. directed B. who held his goods not to deliver them to C. & B. afterwd. supposing C. had a claim upon them delivered him the goods. In a suit A. & B. It was holden that B. was liable unless he could establish C's claim 2 Saund 47 f 4 T.R 26.

Where A. delivered goods to B. per C. & B under a knowledge of all circumstances acknowledged that the belong. to D. It was holden that in a suit by D. agt. him he should not be permitted to set up C's title 20 C L 153 2 Camp. 344 2 Ba & Co 541

[illegible]

Vis 3. Day 3/3 Aug.

Said in 9 Johns R. 107 that the mere poss. of a personal chattel with the consent of the true owner will not render the chattel liable to the debts or disposition of the reputed owner unless it appears the poss. was fraudulent which fact might be implied from the special circumstances of the case. But a continued poss. is prima facie evidence of fraud as agt. creditors 19 Johns R 334. 15 do 480. 2 do 418 5 do 435 3 Cof R 52

16 Johns 278
2 Ch. Chan. 152

Bailees Creditors. It is provided by 21 Jac 1 that if a person become bankrupt & has in his possn. order or disposition another's goods with his consent the goods are liable for his debts 1 Atk 226 Doug 303 1 Bos 82 1 Atk 166 Esp 566 8 Ves 82 1 Bos 348 2 N R 37 / he have no such St. in Eng. S. 124 [illegible]

This St. relates to persons becoming bankrupts & will also apply in this country to bailees becoming insolvent for here there is no bankrupt law. It extends as well to goods which were permitted to be in his possn as well as his own. Coup 232 1 Bos 82 Esp 569 3 Ch & L 1140 1 Scott 149.

Or to goods originally his own by the 13 Eliz as well as by C S acts of them without possn would have been considered as fraudulent against creditors. This St. proceeds on the ground of fraud. Act 13 Eliz allows creditors to take goods not actually on the ground of fraudulent concealment of the possn which would tend to obtain him a false credit. Possn of personal chattels being evidence of ownership if bailee gives the bankruptcy opportunity to deceive he ought to suffer as well as the creditors - merely rebutting a presumption of fraud between bailor & bailee under this St. & Co 81 Coup 233 2 N R 380 7 1 Bos 354 3 Esp 505 1 Atk 180.

This St. seems to be in affirmance of the C S rule that where two innocent persons must suffer by the act of a third he who has enabled the third to commit the loss must rather sustain it 2 N R 370 / This St. is consonant to the C S & binding here - 1 St

It does not extend to goods possd by a bankrupt in right of another as an Ext de - for the parties having the description intended

1 P.D. 393
1 Ath. 160
C.B.S. 234

cannot prevent his possn. 1 Cutts 159 3 Pk. 187 3 Ves 618 1 Sean N.P. 192 202 –

but it extends to mortgages of goods as to absolute sale when mortgr. fails & in lapse in possn. 1 Cutts 155 596 1 Ves 348 1 Wils 280 Selw 189 Rol. A. C. 5 H 459 57 1 Sean N.P. 189 1 Ves 244 – 2 Bl 2 624 and 2 b 5

The possn. of a mortgr. of real property does not come within the rule for here possn. is no evidence of ownership – Trover of personal property If a make a sale of his goods to b upon a condn. precedent & the goods remain with a & b performs his condn. (Semb.) b could claim them for he does not voluntarily leave the goods with a & afford an opportunity to acquire a his title is to be perfected in future when he complies with the condn. – There is no established rule on this subject but the authorities seem to imply it. 1 Ves 365 Rol. A. C. 561 2 Wils 594 1 Cutts 160 Ep. 566 Selw 197 7 Wils 91 Thea 955 –

This rule does not extend to the sale of the part at sea for the immediate possn. cannot be taken by reason the buyer must take possn. as soon as possible – There are also other cases where actual delivery is not necessary under special circumstances – If one sells a store of goods of which immediate possn. cannot be given a delivery of the key is sufficient 7 Wils 91 Thea 955 cit supra 2 125 2 Bl 465

To bring a case within the rule the goods must be in his possn. under a intention of a title 3 b 1 as his own goods are sold the vendee or purchaser will not lose his claim. Cowp 233 1 Cutts 85 3 East Ep. 597 8

A temporary possn. for a particular purpose is not within the rule. In bailing an opportunity to mix the goods – If it was not so the law would never be safe – If from the known nature of bailee's business

the presumption of his ownership is excluded his creditors cannot claim against the owner. Ex Commission merchants. 1 Cath 185 Selw 197 Esp 517 Coup 517 1 Pd 318 Ff 185 1 Bos 82 2 Bal 102.

The 21 Ba 1 appears to be in affirmance of the C.S. / Coup 434 / & the Courts of Ex have regarded its principles as C. S. - ante.

Gen. rule - where the bailee does not become bankrupt the owner can recover against any purchaser or any creditor whether taken or levied upon the goods as being the bailees unless intended in market overt - this is C.S. - If the bailee falsely claims to own them bailor may claim them from the bailee - but not against assignees - Ex. bill of sale generally with B sealed B opened & pursued them - bankrupt from the premises - It was said that B appeared to have shewn order & disposal of them as he pleased them but it was his money not & the owner did not feel them in his "possession order" &c 3 Cath 14 1 Wils 8 Stra 1187 Bot 283 5 Ba 260 b E. 579.

Some modern opinions have objected to the owner's claim against a purchaser - It has been recent times suggested that possession of personal chattels ought as to third persons who trust to it be conclusive evidence of ownership. 2 Ff 376 Pd 540

Where the property bailed is money or bank bills bailor must lose them for it is the nature of the thing bailed & not the want of an owner mark that makes this exception to the rule. Bal 12 b Burr 452 15 b 3 Bk 483 E. 6 39 579 80

However strong the bailee's evidence of ownership may be still a purchaser under him or a creditor will not hold in Ex. or Eq. unless the bailee is insolvent - but the has his remedy on the implied warranty

A writing acknowledging the receipt of grain in store or on freight imports a bailment & not a sale but it may be shewn to import a sale by full & explicit evidence of usage among the traders in the article 4th Hill 105 107

was appointed on the commission. Hee Rutherford & Vaughan 110

the bride is involuntary — but the heart his remains with the injured maiden

against bailee. There are no authorities to this precise point but all imply it. So the creditor who attaches on the property may have an remedy, pend. / for the expense incurred if the bailee expends the property on his own. Qre. Mary will the creditor have a remedy for the expense incurred if bailee did not turn out the property on his own. 3 Ellis 44

Tho the bailee is insolvent the creditors cannot claim unless the terms of the bailment enable him to appear as owner or unless the property itself gives him the appearance of actual ownership & enables him to gain fraudulent credit. unless the bailment does enable him thus to appear he is not within the St. 1 Bos 82. 8 648. Doug 306 Cowp 124 1 Ellis 185 Bos 243 7 Ellis 67 9 237 3 Ellis 44 –

Where goods are left with the vendor for a particular reasonable incumbering purpose it is not within the St. 2 Geo. 2 c. 25 where B took a bill of sale of B. of oxen & hay they lived 20 miles apart the sale was made 2 in the month of March. Held on that he was entitled to recover for there was good reason for leaving the goods with the vendor. Doug 603 1 Ellis 185 Esp 5 67 – N. L. Cases Ch. Judged in C. 20. 16 –

If goods are bailed for hire to be used by bailee for a certain time whether a creditor of bailee can take them in for that time in ext. is not settled by precise authority. I think he cannot for it is a personal trust & cannot be transferred. The bailee who sets his bailee at it is unjust he should be charged for the money to a known & bailee be deprived of his property. No case in law in which a creditor can take in ext. an interest which the debtor could not transfer. The bailee may sue immediately but the bailee after the time has expired for a conversion. The authority of St. Thomas in

Bailment

7 Mod 604 case not reconcile in point this opinion where understood remedium subjectum materiam 5 Mod 90 7 East 6 Ind 464 1 Atk 210 3 Ch 223 Ph 7 Ed 795 1 13 3 2 Bac 353 Dig 3 p 6 –

The rule is law strong generally that the bailee who has the goods in his hands may maintain an action against any stranger who takes away or injures the goods while in his possn of bailee – The rule is the same the other bailor should never have had actual possn – but if a bill of sale is given but no actual delivery – In things found the finder means either to constructive possn while means a right of possn – if bailor has that he may maintain the action – 6 Bac 164 260 1 Roll 14 Sutch 214 2 Saund 268 3 Keble 393 Ibid 438 2 Roll 5 Bac £ 198

The bailor has not always the right of possn – 24 E 3 c 3 bailee for life for ~~life~~ a limited time – then the bailee can maintain neither trover or trespass for an injury done during that time – This point was recently determined – 4 Ve 480 Ch 7 Ve 480 8 Johns 132 Ch 388 £ 198

The bailor must have either an actual or constructive possn at the time of the injury done to maintain either of these actions – In the case of bailment he has neither for the bailee comes here against him during the term – if bailor might maintain his action in which case he could bring it in notwithstanding the bailment or after the determ might retake them as he maintained either trover or trespass which right of retaking he has not & therefore cannot maintain either action – But bailor may maintain an action after the time for the determn – but if the property is destroyed before the term of bailment expires he cannot recover the bailee might & a Court of Eq might compel the bailee to lend his name to the bailor to bring an action against the wrong doer 1 Mass 135 4 Ve 480 1 Brit 68 Esp 57 b – £ 198

If goods shipped in the custody of the carrier are at the risk of carrier he must bring an action for loss or damage to them 28 C.L. 326. 1 id. Tolw. N.P. 405 8 J.R. 330 3 Bos. & P. 2 Camp. 639. By the policy shes has the legal right to claim

4 Day 242

If goods in the posn of the acquirer by the owner to B without delivery & a stranger injures them in the posn of B has no action for he has neither the actual or constructive possn - but in case of B this any slight act will constitute a delivery & delivering to a servant &c Bro 455 2 p. 577 5 Ba 164 7 Ba 71 - £199

Bailor can maintain no action during the time of bailment unless he has a right to demand possn at the time of injury done as in the 1. 5. 4th case p. cases 2 in the 5 he must by what is done & demand delivery - but then may maintain an action for injury done - a pawnor may maintain an action where no day is fixed for redemption Cowp 294 2 p 14 577 - £199

If the bailee gives the goods to a stranger Bailor cannot in the first instance maintain action for possn tortious for the recovery to after demand & refusal he may maintain trover for the bailment is thus determined - In this case the stranger may discharge himself by redelivering the goods to bailee before or after action but not after if after a refusal to deliver to the bailee or evidence of ownership he cannot bound with property redelivered to the bailee 5 Ba 164 237 61 P. 242 1 Roll 206 1 N. B 137 Dr 1 Ba 867 1 Roll 58 £199

Fell Lock agree that most of the bailees may maintain an action for the full value against the wrong doer. Dr 2 p Replinge 39 Litt 31 Ba 1113 5 Ba 165 2 Br Bull 33 Kirly 39 Esp 55 Mo 245 1 Ba 346 Bro 505 -

If a bailee doubts whether a Depositary of the same sort will apply to a Mandatory can maintain an action - Lord Holt on that he cannot unless he has extended his liability by special agreement - The doubt is founded on his liability to the bailor bailm. this is not the

foundation of bailees right of action & even if so that the depositary could maintain the action - it is founded on his special property & hence he has a right of action against a wrongdoer. 5 Ba 185 2 Bl 1 Mod 89 1 Bro 438 13 Co 69 Ch. N. B 89 - 2 199

In Cont. 264 it is laid down that a mere poss.n gives an interest & property - if one has an interest however small he may defend it - If a servant is robbed of his master goods he may maintain an action in his own name against the hundred - notwithstanding the amount of his liability to his master for he is not bailee to him when he is robbed - So he may maintain an appeal of robbery which lead to capital punishment & this is not on the ground of his liability to his master - a special property is suffic against a wrongdoer. 5 Ba 2 Bl 7 Mod 392 8 Esp 577 1 Ba 240 346 300 2 Bl 4 Mod 404 12 Ed 54 13 Co 69 Cont 527 2 Saund 380 Jones 129 30 1 Bull 33 Esp 577 Mod 505 -

If a house in posst of tent. for life is blown down & a stranger takes away the materials the tent. may maintain trover against him founded on his special property & he clearly is not liable over to the reversioner. Bull 33 Esp 575. 7 Bor 114 Doug 155 2.

Recently holden in Eng. that a mere lawful posn. gives a right of action to a depositary then can maintain the action even if the liability over were the foundation of the action - for liability means possible liability & he might be not liable over - His said he is only liable in case of fraud - but how can he take advantage of that - the fraud is against the bailor & the thief cannot reply "if you had not been guilty of grap neglect I had not stolen" - his own liability cannot be tried in an action against the wrongdoer & if it was tried it would not bind the bailor & would be inadmissible - Gen. convenience requires that bailee should have the action as the bailor may be absent & a speedy remedy necessary - The rule is settled on authority

In an action of Trover for a Bill Defts plead in bar that he was lawfully possessed of it — held bad for he might have been so by finding & still have no right to retain it against the true owner 27 L. & S. 547.

May be valent to speedy remedy where pays the rule is rotted on a trust

analogy & principle - Pl. 397

If a bailee delivers goods to a stranger the stranger may have the action against a third person who violates his possession, for he has a special property & is liable to the bailor & bailee. 5 Ba 260 Pl. 242 1 Pl. 811 807 -

An auctioneer or broker may maintain an action in his own name on a contract for goods sold against the buyer tho they are known to belong to another - for he has a beneficial interest - commission & sell in his own name. 1 H Bl 81 2 591 1 Ch. Pl. 5 1 Bull 130 Park. Ins. 403

When the bailor & bailee have both a right to sue there can be but one recovery for the full value hence a recovery by one in trespass or trover bars the other of his action for the full value & it is said in 1 Roll 596 that he who first recovers bars the other's action - where both have the action at the same time the one who first gets judgt bars the other. 13 Co 69 5 Ba 165 2 63 8 Vin 22 - 2 Saund. 47 e.

But does not the commencing an action by one for the full value bar the other of his action as a right of recovery is attached by commencing the action? This is analogous to the case of an appeal for robbery by Master & servant he that begins first shall bar the other. 3 Ba 559 Latch 127 -

So too it is analogous to the case of an escape in which if the creditor or plaintiff commence an action against the Sheriff before or pending taking or return of the prisoner he attaches to himself a right of recovery & shall not be outed by a subsequent return or taking of the prisoner 3 Co 44 b 32 Hea 873 1 Roll 808 Co. 5 65 -

If bailee receives satisfaction of the wrong doer he cannot maintain

an action against the bailee for he can have but one remedy. 3 Bac 280 Dyer 1217 Cro E 24 32 Yelv. 68 Bul 11 3 Bac 124 Esp 316.

To Dent if bailor first commence litigation against the wrongdoer the bailee is discharged - for he relies his action against him. I find no authority to this point. But if it is true that bailor by commencing an action against the wrongdoer puts the bailee of his action the rule must be so on principle or injustice may follow. The case is analogous to that of prisoner escape in which if Pff proceeds against the prisoner the Sheriff is discharged Dent. so also it is analogous to a tenant of chattels one of two remedies Esp 610 12 Cro E 104 or 177 Hutt 98 - 5 Ba 179 Bul 248 12 Mod 663 - 2 Bac 88.

So according to I Roll if the bailee sues for the whole value he is liable to bailor at all events - Dent. contra / There is no precise authority to this point tho it must be so if the bailee by commencing a suit puts the bailor of his action - But if bailee recovers the full value of the wrongdoer the bailee may still recover special damages. 3 Bac 63 -

If the bailor takes the goods from bailee before his special property is determined the bailee may have his special action against the former - Mr. Coke says he may have trespass or trover but this seems incorrect for there action is for the full value - the special property gives the bailee a right to have these actions against a stranger only - the thing is not the bailee's as between him & bailor he has only a special property entitling him to enjoy & use it. Saville 13 Con by that bailor's recovery stops bailee mitigate damages & that Bailee or Pff may sell lie but Dent. if there is all cases damages are mitigated when the full value is sued for. Perhaps so long as the property before suit arises Pff has originally a prima facie at least a right to recover the whole. 3 Bac 185 2 Bac 401

Bailment

5 B & Ald 505 1 Ba 240 Yelv. 172 1 Roll Ab 128 –

But the bailee as against bailor has no such right prima facie. But suppose the special damage greater than the value of the property can damages be increased or aggravated? A strong objection to the rule in 13 Co 69 is that in an action by bailee against bailor the value of the property is no rule of damages – Trespass & Trover ~~which are~~ which are but for the value of the property seem therefore unadapted to the case. See qu.

If the bailee wrongly to bailor's order delivers the goods to another ~~wrongfully~~ he is guilty of a conversion & Trover lies against him without demand for the bailor's determined 4 T R 460 2 W Bl 581

Generally the bailor can have no other action than detinue which is now out of use – for special action on the case for negligence trover for conversion or Assumpsit on the promise express or implied to redeliver 1 Ba 237 Burr 2 Co 781 Cow 244 4 Term 258

Where the bailee is injured by the neglect of the bailee he may sue alone in Assumpsit or in tort 3 East 62 1 Wils 282 Ld 310 –

Generally trespass will not lie for bailor against bailee for the original property was lawful – seems if the bailee destroy the goods for such act determines the bailment – 8 Co 146 Cro Eliz 191 1 Inst 57 Yelv 13.5 2 Roll 557 2 T R 466 Mur 248 qu – 5 Ba 266 5 Term 581 3 Leth. 46

Secd. there is a case in Hob which says that a class of things bailed by bailee will authorise trespass – See qu. to this doctrine & it is laid down in no elementary writers –

1st Inst

Lindenbrunch

1848

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